MISSISSIPPI LAW JOURNAL

MYTH AND REALITY IN CONSUMER CREDIT RATE REGULATION

James L. Robertson

CONSTITUTIONAL LIMITS OF STATE DEBT: THEIR EFFECTS ON INTEREST COSTS

Dr. Kenneth W. Hollman and
Dr. Walter J. Primeaux, Jr.

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MYTH AND REALITY IN CONSUMER CREDIT RATE REGULATION

*James L. Robertson**

I. General Introduction

A. The Context

Interest rates and rate limitations have been a subject of widespread concern in Mississippi in recent years. In the tight money times of 1970 there was a considerable controversy over the efficacy of Mississippi's general eight percent usury statute.[1] The advent of Truth-In-Lending,[2] and the increasing awareness of the rates actually being charged by small loan companies,[3] have been a cause for further concern.

The controversy reached the boiling point in 1972. After being subjected to extensive lobbying, both houses of the legislature enacted Senate Bill No. 1535.[4] This bill would have authorized sellers, lenders

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[1]Senate Bill No. 2209 (1970 Reg. Sess.); House Bill No. 1814 (1970 Reg. Sess.). The latter bill, which would have increased the general usury limitation to ten percent per annum, created considerable controversy. *See also* House Bill No. 272 (1970 Reg. Sess.) which would have restricted credit card rates to eight percent.

[2]15 U.S.C. §§ 1601-13, 1631-41, 1661-65, 1671-77 (1970), and 18 U.S.C. §§ 891-96 (1970). This federal enactment, which for the most part became effective on July 1, 1969, is properly known as the Federal Consumer Credit Protection Act of 1969. Title 1 of that Act, dealing with the consumer credit cost and rate disclosure, is popularly known as the Truth-In-Lending Act, 15 U.S.C. §§ 1601 *et seq.* (1970).

[3]By law small loan companies are permitted to charge a rate not to exceed "two percent (2%) of the amount of cash received by the borrower multiplied by the number of months for which the loan is extended." Miss. Code Ann. § 5591-09 (b) (Supp. 1971). Truth-In-Lending has disclosed that the true rate on loans made at the ceiling is 41.69 percent annual percentage rate (APR).

[4]A similar bill had failed in 1971. House Bill No. 705 (1971 Reg. Sess.). The impetus for the enactment of a credit card rate bill was greatly increased in 1971 because of the threatened importation of such recent decisions as State v. J. C. Penney Co., 48 Wis. 2d 125, 179 N.W.2d 641 (1970), holding that a 1½ percent per month charge on the declining unpaid balance of a retailer's revolving charge account violated Wisconsin's 12 percent usury limitation. *Contra,* Sliger v. R.H. Macy & Co., 59 N.J. 465, 283 A.2d 904 (1971).

and issuers of credit cards to impose a maximum finance charge of 1½ percent per month. On May 8, 1972, Governor Waller vetoed Senate Bill No. 1535.[5]

In his veto message, Governor Waller recommended that an "in depth study be made relative to all laws concerning interest rates." He stated his belief that an intensive examination into the area of finance charges and consumer financing can result in a modernization of our laws. The Governor noted that Mississippi's current laws regulating interest and finance charges "are in a state of confusion." He urged that all Mississippians work together "to develop much needed reform in our installment credit laws."[6]

Governor Waller's recommendations are sound. Mississippi's existing rate structure is in great and immediate need of modernization. This can best be accomplished by the sort of intensive study recommended by the Governor. This article has been prepared in the hope that it will assist those officially charged with the making of such a study.[7]

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[5]Veto Message of Governor William L. Waller delivered to the Mississippi State Senate on May 8, 1972. Shortly thereafter, a civil action was filed in the Circuit Court of the First Judicial District of Hinds County, Mississippi, styled *Deposit Guar. Nat'l. Bank v. Ladner,* challenging the legality of the veto. The decision of the circuit court, which undoubtedly will be appealed, was reported in the Jackson Clarion Ledger, July 12, 1972, at 1:

> Hinds County Circuit Judge M. M. McGowan ruled Tuesday [July 11, 1972] that Governor Bill Waller's attempted veto of an 18 percent interest rate on credit card and revolving credit accounts was not returned to the Senate before a veto deadline, and that the measure is now state law.

On July 25, 1972, Justice Robert G. Gillespie denied a Petition for Supersedeas from the trial court's order.

In addition, there are presently pending at least two civil actions, which challenge under the general usuary statute the 1½ percent per month rate regularly charged by BankAmericard and Master Charge, the two leading consumer credit companies doing business in Mississippi. Roper v. Consurve, Inc., No. 4261 (S.D. Miss. 1972), and Mize v. First Nat'l. Bank of Jackson, No. 4359 (S.D. Miss. 1972). Nothing said herein is intended to indicate any opinion concerning any pending litigation, nor is it intended in any way to influence the outcome of such litigation or to suggest what that outcome should be or will be. Further, since the following discussion is based primarily upon economic, not legal, principles, the outcome of these pending lawsuits will in no way affect the validity of the conclusions and recommendations presented herein.

[6]Veto Message, *supra* note 5.

[7]This article is not intended to be the "intensive examination" suggested by Governor Waller. Its purpose is the presentation of the consumer credit problem and a suggested remedy.

B. The Thesis

Rate regulation in Mississippi is in disarray.[8] Our statutory rate ceilings,[9] and the judicially recognized exceptions[10] to them, have produced an irrational and arbitrary segmentation of the consumer credit market which is outdated and archaic. Rate control in Mississippi has replaced prohibition as the leading absurdity in our present law, our usury statute being honored more in breach than in observance.[11]

It appears that the rate structure and the rate regulation policy of the Uniform Consumer Credit Code[12] are the appropriate antidotes. The UCCC treats rates in a modern, sound and economically realistic way.[13] It is a sophisticated, economic statute designed to assure an adequate availability of credit for the consumer. Rate ceilings are set at relatively high levels, with the forces of competition in the market place being substituted for state controls as the primary regulator of rates. This new

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[8]The author has also discussed this subject in Robertson, *The Uniform Consumer Credit Code in Mississippi,* 54 MISS. BANKER 13 (1970), and briefly in Robertson, *Consumer Protections Under the Uniform Consumer Credit Code,* 41 MISS. L.J. 36, 42-3 (1969) [hereinafter cited as Robertson, *Consumer Protection*].

[9]*See* discussion at § II(A) *infra.*

[10]*See* discussion at § II(B) *infra.*

[11]Nationwide it is clear that well over 50 percent of the aggregate amount of all credit outstanding is not subject to the usury laws of the various states. Benfield, *Money, Mortgages and Migraine—The Usury Headache,* 19 CASE W. RES. L. REV. 819, 852-57, 892-99 (1968).

[12]The UNIFORM CONSUMER CREDIT CODE will be referred to alternatively throughout this article as "The UCCC" and as "The Code." Unless otherwise noted, all references are to the Revised Final Draft which was approved by the National Conference of Commissioners on Uniform State Laws on July 30, 1968. The UCCC was endorsed by the House of Delegates of the American Bar Association on August 7, 1968. *See* 54 A.B.A.J. 1026 (1968). Minor amendments were made by the NCCUSL in 1970 to avoid conflict with the Truth-In-Lending Act. These amendments were endorsed by the ABA on August 11, 1970. *See* 56 A.B.A.J. 990 (1970).

The UCCC has been enacted in the states of Utah, Oklahoma, Indiana, Wyoming, Idaho and Colorado. New consumer credit codes patterned largely after the UCCC have recently been enacted in Alabama, Louisiana, Wisconsin. In Mississippi, the UCCC was introduced as House Bill No. 878 in the 1971 Regular Legislative Session and as House Bill No. 256 in the 1972 Regular Legislative Session.

[13]There are a number of excellent, comprehensive discussions of the UCCC rate ceilings concept. These include: Johnson, *Regulation of Finance Charges on Consumer Instalment Credit,* 66 MICH. L. REV. 81 (1967); Jordan and Warren, *The Uniform Consumer Credit Code,* 68 COLUM. L. REV. 387, 388-408 (1968); Kripke, *Consumer Credit Regulation: A Credit-Oriented Viewpoint,* 68 COLUM. L. REV. 445, 446-55 (1968); Benefield, *supra* note 11, at 819; Felsenfeld, *Consumer Interest Rates: A Public Learning Process,* 23 BUS. LAWYER 931 (1968). All of these are essential reading for anyone seriously interested in understanding consumer credit rate regulation. *See also Rate Regulation Under the UCCC,* 55 MINN. L. REV. 525 (1971).

rate policy would permit creditors to earn a fair profit, while ensuring that the consumer will pay no more for credit than is economically necessary.

C. *Preliminary Considerations*

There are several problems of terminology which must be resolved at the outset. These problems concern (1) the nomenclature to be given to the charges imposed by credit vendors and (2) the establishment of a uniform method of computation of rates.

1. *Finance Charge Terminology*

Charges made for the extension of credit were originally denominated "interest." Then came the "service charge." Today there are a myriad of such terms in use, such as "carrying charges," "points," "discounts," "loan origination fees," "finder's fee," "time price differential," and many others. The result was that, prior to 1968, even the most sophisticated consumer had a difficult time determining exactly what he was being charged for the credit.[14]

The Truth-In-Lending Act cut through this hodgepodge and substituted one simple term, "finance charge." The finance charge includes by law:

> [T]he sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit . . . .[15]

2. *Rate Terminology and Computation*

The Truth-In-Lending Act also unified terminology to be used in rate disclosure. The Annual Percentage Rate (APR), basically a simple interest rate, generally is that

> [r]ate which will yield a sum equal to the amount of the finance charge when it is applied to the unpaid balances of the amount financed, calculated according to the actuarial method of allocating payments made on a debt between the amount financed and the amount of the finance charge, pursuant to which a payment is applied first to the accumulated finance charge and the balance is applied to the unpaid amount financed.[16]

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[14]The Mississippi Small Loan Regulatory Act, MISS. CODE ANN. §§ 5591-01 *et seq.* (Supp. 1971), and the Mississippi Motor Vehicle Sales Finance Act, MISS. CODE ANN. §§ 8075-01 *et seq.* (Supp. 1971), both contain disclosure requirements which were difficult to comprehend until Truth-In-Lending became law on July 1, 1968.

[15]15 U.S.C. § 1605 (a) (1970).

[16]15 U.S.C. § 1606 (a) (1) (A) (1970).

Wherever rate comparisions are made in this article, the rates will be converted to APR's.

3. *"Simple Interest" and "Add On Interest"*

Even though we now have the uniform terminology and method of rate computation prescribed in the Truth-In-Lending Act, an understanding of the difference between "simple interest"[17] and "add on interest" is still a necessary predicate to any consideration of rates in Mississippi.

This difference can best be explained by an illustration. Consider the case of an automobile dealer who sells a used car to a buyer on time for $1,000 with payments to be made in twelve equal monthly installments at the "rate" of 10 percent per annum. If the finance charges are computed according to the "simple interest," or declining balance, method of calculation, the total finance charge paid would be $55.00. The contract would be paid in twelve consecutive monthly payments of $87.92 each. The APR, being a "simple interest" rate, would be 10 percent. The key here is to understand that these figures include in each monthly payment finance charges on the *unpaid balance only*. If the same transaction were put on the "add on" basis, the total amount of finance charges would be $100.00. The contract would be paid in twelve consecutive equal monthly payments of $91.67. The "rate" applied would still be 10 percent, but the APR would be 18 percent. This is because the amount of finance charges imposed would then be based on the multiplication of the total principal amount of the contract by finance charge rate.[18] In fact, the amount of principal outstanding will decline each month, and it will be zero at the end of twelve months. Still, under the "add on" method of calculation, finance charges on each installment and on the final installment would be computed and charged *as though the entire principal amount of the contract were still outstanding*. This is because under the "add on" method the amount of the monthly installments is computed by adding finance charges for the full term to principal and then dividing that sum by the number of installments.

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[17]To the purist the term "simple interest" applies only to single payment obligations. In consumer credit transactions, we are concerned primarily with installment obligations. Technically, the distinction made above should be between "the annual percentage rate calculated on the declining unpaid balance" and "the add on rate". We will, however, state the comparision in terms of "simple interest" and "add on interest" in the belief that these terms will be more familiar to many readers.

[18]*Compare* Miss. Code Ann. § 5212 (1956) *with* § 5590 (Supp. 1971).

II. Current Legal and Economic Realities in Consumer Credit Rate Regulation

The starting point in the development of any proposal for change is a review of the situation as it currently exists.[19] This review will be presented in two parts. First, various rate limitations, statutory and otherwise, now in effect in Mississippi will be described. Second, certain economic realities upon which any effort at modernization of our laws regarding interest rates and finance charges should be based will be considered.

A. *Statutory Rate Ceilings in Mississippi*

The following rate limitations are currently in effect in Mississippi:

(1) *General usury limitation.* The general Mississippi usury statute provides that contracts may be made in writing for a payment of a rate of interest as great as 8 percent per annum, but no more.[20] The statute further provides that if a rate in excess of 8 percent is contracted for or received, then all interest shall be forefeited. If the rate should be in excess of 20 percent, then both principal and interest shall be forfeited. The original usury statute in Mississippi even before statehood provided for an 8 percent per annum rate of interest.[21] This act remained in effect until June 25, 1822, when the legislature increased the maximum rate to 10 percent per annum.[22] The 10 percent usury limitation prevailed in Mississippi for ninety years thereafter.[23] In 1912 the legis-

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[19]For general background *see* B. Curran, Trends in Consumer Credit Legislation (1965); Chapman & Shay, The Consumer Finance Industry: Its Costs and Regulation (1967); National Retail Merchants Association, Economic Characteristics of Department Store Credit (1969).

[20]Miss. Code Ann. § 36 (Supp. 1971).

[21]Apparently from the territorial days of 1805 until 1817 the written contract interest rate was 8 percent. Act of March 1, 1805, 404 Toulmin 312. However, the state's first constitution provided that no legislative change could be made in the interest rate on written contracts until 1821. Miss. Const. art. 6, § 10 (1817). *But see* Act of 1818 at 200. Just where this left the interest rate from 1817 until 1821 is unknown.

[22]When the new capitol moved to LeFleur's Bluff (later renamed Jackson) in 1822 the legislature took advantage of the lapsing of the constitutional prohibition against changing interest rates. Miss. Const. art. 6, § 10 (1817). Thus the new rate became 10 percent. Act of June 25, 1822, [1822] Miss. Laws [codified in Miss. Rev. Code. ch. 105, § 2 (1823)].

[23]The rate remained unchanged for ninety years. Miss. Code ch. 47, art. 3, §§ 1, 2 (1857); Miss. Rev. Code § 2279 (1871); Miss. Rev. Code § 1141 (1880); Miss. Ann. Code § 2348 (1892); Miss. Code § 2678 (1906).

lature lowered the general usury limitation to 8 percent where it has remained.[24]

(2) *Corporate loans.* Mississippi law presently provides that any corporation organized for profit may agree to pay any rate of interest not exceeding 15 percent per annum provided that the principal balance to be repaid exceeds $2,500.00.[25]

(3) *Installment loans.* Mississippi has no general installment loan act. There is, however, one general rate statute in Mississippi governing installment loans.[26] That statute expressly authorizes the add-on method of computation for interest on installment loans not in excess of 6 percent per annum. The 6 percent add-on maximum rate limitation for a twenty-four month installment loan converts into an 11.13 percent APR.[27] A special statute provides that any bank or trust company may make installment loans in an amount not exceeding $1,000.00 and charge interest at an 8 percent add-on rate, or 14.5 percent APR.[28]

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[24]In 1912 the rate was again reduced to 8 percent. Act of Feb. 24, 1912, ch. 229, § 1. [1912] Miss. Laws. This rate has remained in effect until the present. Ann. Miss. Code § 2075 (Hemingway 1917); Miss. Code Ann. § 1946 (1930); Miss. Code Ann. § 36 (1956), *as amended,* Miss. Code Ann. § 36 (Supp. 1971). For a history of the usury problem which dates to pre-Biblical times *see* Johnson, Interest and Usury (1969).

[25]Miss. Code Ann. § 36 (Supp. 1971). The corporate rate exception to the general usury limitation has permitted banks and other lenders to make commercial loans at rates higher than 8 percent. This relief was necessary during the times when interest rates nationally were soaring. Because the general usury limitation was not relaxed for individual borrowers, the frequent result has been that the small businessman and farmer, generally considered to be among those being "protected" by the usury statute, have been forced to incorporate in order to get loans. The expense and inconvenience resulting from these "forced" incorporations greatly exceed any benefits being derived from the so-called "protection" afforded by the usury statute. This is particularly so in view of the fact that these small businessmen and farmers have had to pay the higher rate anyway.

[26]Miss. Code Ann. § 5590 (Supp. 1971).

[27]In converting add on rates to APRs, it is important to note that the APR will vary slightly with the length of the contract. For example, as indicated above, 6 percent add on yields an APR of 11.13 percent on a 24 month installment loan, but only 8.98 percent APR on a 3 month loan. Also, 6 percent add on for 36 months yields 11.08 percent APR; 60 months, 10.85 percent APR; and 120 months, 10.21 percent APR.

[28]Miss. Code Ann. § 5212 (Supp. 1971). This statute provides that, in addition to the basic 8 percent add on rate, the bank may impose "a charge in an amount not exceeding one dollar ($1.00) per one hundred dollars ($100.00), or fraction thereof, of loans for the cost of credit investigation or appraisal of the security offered as collateral". Where this is done, for a $1,000.00 loan for various maturities the true APR would be as follows: 6 months, 16.94 percent APR; 12 months, 16.21 percent APR; 18 months, 15.82 percent APR; 24 months, 15.55 APR; and 36 months, 15.11 percent APR.

(4) *Discounts.* By express statutes, the maximum discount rate here shall be the same as the maximum permissible interest rate, or 8 percent[29].

(5) *Small loans.* The Small Loan Regulatory Act[30] authorizes a basic rate charge of 2 percent per month add-on for loans of $100.00 or more.[31] When converted to yearly rate terms, this authorization provides for a 24 percent add-on rate per year or a 41.69 percent maximum APR. This rate by statute includes both interest and service charges.

(6) *Retail installment sales.* Mississippi has no retail installment sales act such as those found in many states. By decision of the Supreme Court of Mississippi, installment credit sales generally are excluded from the regulation of interest and usury laws by the "time price" doctrine.[32] Under this rule of law, so long as the seller complies with the requirements of the doctrine, he can charge the buyer whatever "time price differential" the buyer will agree to pay. In other words, there is today in Mississippi, no legal limitation on the maximum rate or amount of time price differential which may be charged in a retail installment sale.

(7) *Motor vehicle installment sales.* In the area of installment sales, the only exception to the general application of the time price doctrine is the Motor Vehicle Sales Finance Act.[33] Here, rate ceilings are classified by manufacturer's model year and stated in terms of dollars per $100.00 per year. These rate ceilings are as follows: $7.00 per $100.00 due per year on a new or one-year old model (12.75% APR); $10.00 per $100.00 due per year on a two-year old model (18% APR); $13.00 per $100.00 due per year on a four-year old model (23.25% APR); $15.00 per $100.00 due per year on a model more than four years old (26.5% APR).[34] The age of the vehicle is determinable by reference to the date of manufacture, not the date of sale.

(8) *Credit unions.* Under the Mississippi Credit Union Act, a maximum rate of 1 percent per month "on unpaid balance" may be charged.[35] This statute is worded so that add-on computation is probably pro-

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[29]MISS CODE ANN. § 36 (1956); MISS. CODE ANN. § 38 (Supp. 1971).

[30]MISS. CODE ANN. §§ 5591-01 *et seq.* (Supp. 1971).

[31]MISS. CODE ANN. § 5591-09(b) (Supp. 1971). The Act contains no limitation on the size of loans nor is a maximum maturity limitation imposed on loans of $100 or more.

[32]*See* § II(B) *infra.*

[33]MISS. CODE ANN. §§ 8075-01 *et seq.* (Supp. 1971).

[34]MISS. CODE ANN. § 8075-14 (Supp. 1971). The APR's will vary slightly with the maturity of the contract.

[35]MISS. CODE ANN. § 5410 (1956). Compare 12 U.S.C. § 1757(5) (1970).

hibited. Therefore the maximum rate permissible for credit unions in Mississippi is 12 percent APR.

(9) *Pawnbrokers.* The maximum permissible rate lawfully chargeable by pawnbrokers in Mississippi is 10 percent per annum.[36]

(10) *Revolving charge accounts, or credit card sales.* Most major credit card companies in Mississippi currently charge 1½ percent per month on unpaid balances (18% APR).[37]

(11) *Banks and savings and loan associations.* In Mississippi all banks and savings and loan associations are subject to the general usury limitation.[38] With the exception of the installment loan rate laws listed above[39] and the corporation loan limitation listed above[40] there are no exemptions for banks and savings and loan associations from the general usury statute.

B. The Time Price Doctrine

While not authorized by any statute, the time price doctrine is the major loophole in the effort to control rates by general usury statutes. Because of its importance in Mississippi, this doctrine deserves special treatment.

The rule in substance is as follows: A seller of merchandise may quote to the buyer a bona fide cash price and a greater time price. If the buyer accepts the time price, there is no usury involved even though the differential between the cash price and the greater time price exceeds the maximum amount of interest which could lawfully be collected.[41]

This vehicle for evading the usury laws was originally recognized by the Supreme Court of the United States in *Hogg v. Ruffner.*[42] There

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[36]Miss. Code Ann. § 5580 (1956). In connection with the recommendation hereinafter made, note should be taken that the UCCC does not apply to the rates and charges of pawnbrokers. UCCC § 1.202(4). *But see* Miller, *The Perplexing Status of Pawnbrokers Under the UCCC,* 24 Okla. L. Rev. 121 (1971).

[37]*See* note 5 *supra.*

[38]Miss. Code Ann. §§ 36, 5288-15 (g) (Supp. 1971). *See also* 12 U.S.C. § 85 (1970).

[39]Miss. Code Ann. §§ 5212, 5590 (Supp. 1971).

[40]Miss. Code Ann. § 36 (Supp. 1971).

[41]*See generally* Annot., 14 A.L.R.3d 1065 (1967).

[42]66 U.S. (1 Black) 115 (1861).

the Court stated what it considered to be the established rule as follows:

> But it is manifest that if A propose to sell to B a tract of land for $10,000 in cash, or for $20,000 payable in ten annual installments, and if B prefers to pay the larger sum to gain time, the contract cannot be called usurious. A vendor may prefer $100 in hand to double the sum in expectancy, and a purchaser may prefer the greater price with the longer credit; and one who will not distinguish between things that differ, may say, with apparent truth, that B pays a hundred percent for forbearance, and may assert that such a contract is usurious; but whatever truth there may be in the premises, the conclusion is manifestly erroneous. Such a contract has none of the characteristics of usury; it is not for the loan of money, or forbearance of a debt.[43]

The Mississippi Supreme Court has long accepted the fact that one may set his own price on goods or services offered for sale, and may quote a cash price and greater time or credit price.[44] The time, or deferred payment, price may exceed the cash price by a larger percentage than that allowed under the usury statute without rendering the transaction usurious. The reasoning supporting this rule is that the additional amount of the time price is not interest but is a part of the original price charged for the goods or services.

In *Bryant v. Securities Investment Co.,* the Supreme Court of Mississippi stated the accepted rule:

> The principle is well established by the decisions of this Court that where property is sold on credit, the fact that the difference between the credit price and the cash price exceeds the percentage permitted by the usury laws will not render a transaction usurious, if the parties acted in good faith. . . .[T]his Court [has] held that a seller may charge a credit price much larger than his cash price and that in such event the difference is not interest. . . .[45]

Under the authority of *Bryant* and the other cases cited, it may be safely assumed that the time price doctrine is firmly established in Mississippi.

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[43]*Id.* at 118-19.

[44]Bass v. Patterson, 68 Miss. 310, 8 So. 849 (1890); Commercial Credit Co. v. Shelton, 139 Miss. 132, 104 So. 75 (1925); Benson v. Berry-Dampeer Co., 158 Miss. 237, 130 So. 157 (1930); Crabb v. Comer, 190 Miss. 289, 200 So. 133 (1941); Bryant v. Securities Inv. Co., 233 Miss. 740, 102 So. 2d 701 (1958); and Mullins v. Merchandise Sales Co., 192 So. 2d 700 (Miss. 1966).

[45]Bryant v. Securities Inv. Co. 233 Miss. 740, 744-45, 102 So. 2d 701, 702 (1958).

C. *Economic Realities of Rate Regulation*

1. *True Rates Are Set in the Market Place*

There are several economic realities concerning finance charges made in consumer credit transactions which must be recognized. First, in an economic sense, credit is a commodity in the same way that a television set is. A finance charge is the price at which the credit commodity sells. The true rates and amounts of finance charges, as is the case with all other prices, are largely set by the market place. The forces of supply and demand, the cost of making credit available, the cost of administering credit extension, the risk of default and the like, and many other economic factors, are ultimately going to determine the true cost of credit. Except on a temporary basis, these factors cannot be overridden or controlled by legislative fiat. Therefore, the first myth with which we must be concerned is that the true cost of credit can be, or is being, controlled by usury statutes or other rate ceilings imposed by law.

> [I]f ceilings imposed are so low that credit grantors cannot make a reasonable profit, they will either obtain a reasonable profit from some other source or by some other name or they will cease extending credit, in whole or in part. Consequently, it is no more possible for legislatures to keep down or force down rates of interest by setting maximum ceilings and maintain the same quantum of credit than it would be for legislatures to forbid inflation.[46]
>
> . . . If legislative ceilings on credit charges are not consistent with basic economic principles, they will no more keep down or force down interest rates generally (and provide the same quantum of credit) than King Canute was able in the year 1028 to hold back the tidal waters of Denmark and England.[47]

2. *Low Rate Ceilings Frequently Produce Price Increases*

A closely related myth is that the imposition by law of low rate ceilings protects the consumer from excessive finance charges. This myth ignores the reality that in economics, as elsewhere, there is always a way to do indirectly that which one is prohibited from doing directly. When rate ceilings are set unrealistically low, and if credit vendors decide to stay in the market, they simply find some other way to exact from the consumer the amounts necessary to make up the true rate and finance charge which the credit vendor must have in order to earn a rea-

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[46]Malcolm, *The New Maximum Charges in* R. JOHNSON, THE REALITIES ON MAXIMUM CEILINGS ON INTEREST AND FINANCE CHARGES 33 (1970).

[47]*Id.* at 34.

sonable profit. In the installment sales field, the most obvious tactic for evading unrealistically low rate ceilings is a simple increase in the basic price of merchandise.[48]

Consider the specifics of this contention. If a merchant selling his wares on an installment basis concluded that he actually needed a 20 percent rate on all time sales to cover his overhead and the risk of default and still permit him to make a fair profit, he could easily do this in spite of any rate limitation imposed by the state. If the 8 percent usury statute were applicable (which it is not) the merchant could easily increase the retail sales price of each item of merchandise by 12 percent. While realizing that this is an oversimplification,[49] the point is illustrated. Further, this premise is supported by evidence gathered in empirical studies.[50] Here, the politicans would have their low rate bill; the credit vendor would have his revenue; and, as is almost always the case, the consuming public would foot the bill.

This example leads us to one of the many inequities produced by low rate ceilings. When the merchant increases his retail prices because he is confronted with an unrealistic rate ceiling, the credit consumers are not the only ones who pay the fare. What happens is that cash buyers, both those who do not need credit and those who cannot get credit, are also forced to pay more for their goods and services, and consequently," carry a part of the cost of credit for which they receive no benefit."[51] Professor Lynch refers to this as the "credit consumer subsidy."

> Whenever a retailer incurs credit costs in excess of credit revenue, he must make up the loss by charging higher cash prices. The amount by which cash prices are raised to cover

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[48]*Id.* Shay, *The Uniform Consumer Credit Code: An Economist's View,* 54 CORNELL L. REV. 491, 498 (1969); Lynch, *Consumer Credit at Ten Percent Simple: The Arkansas Case,* 1968 U. ILL. L. FORUM 592, 599, 606.

[49]If the true cash price of a particular piece of merchandise were $100.00, and if the seller needed a 20 percent APR in order to economically sell on credit, the time price would be $111.16. An "add on" rate of $11.16 per $100.00 on a 12 month installment sales contract produces an APR at 20 percent. If the 8 percent usury limitation were applicable, the seller on a 12 month installment contract would be able to net only $4.39 per $100.00. If all sales were made on a time basis, our hypothetical seller would need to increase the price of the $100.00 piece of merchandise by $6.77, or about 6¾ percent. Of course, all sales are not made on time. This means that the markup economically required by the low rate ceiling would be even smaller. This, however, requires cash buyers to subsidize credit buyers.

[50]Lynch, *supra* note 48, at 599.

[51]Malcolm, *supra* note 46, at 35; National Retail Merchants Association, *supra* note 19 at 24.

> losses on credit operations represents the amount of subsidy paid by cash buyers. The recipients of the subsidy are credit customers.[52]

In short, where rate ceilings are set at unrealistically low levels, cash customers pay more. They pay part of the cost of credit, but receive none of the benefits. Conversely, in such situations, credit customers do not bear the full burden of paying the cost of one of the commodities, i.e., the credit, which they purchase.

The point is brought home by a recognition of who the cash buyers are. Generally speaking, they fall into three categories (1) the rich, (2) those who are prudent in the management of their finances, and (3) the very poor. Ordinarily, policy considerations, such as worthiness and need, would require that these be the three groups entitled to the most protection against payment of charges not economically necessary incidents to the cash sale. Yet, low rate ceilings make these groups pay for credit along with everyone else. Where is the equity in that state of affairs?

3. *Creditor Profits Do Not Fluctuate With Rate Ceilings*

Still another myth is that high rate ceilings enable credit vendors to receive unreasonably high profits. The fact is that rate ceilings do not significantly affect the creditor's profit at all. Rather, rate ceilings restrict the availability of credit, or, if they are set too low, cause creditors who maintain the same quantum of credit to continue to obtain "a reasonable profit from some other source or by some other name."[53]

There is a rather large body of public opinion which holds to the view that, regardless of rate ceilings, creditors regularly earn excessive profits. This view derives from the traditional prejudice of the public against its creditors. The facts, however, are that the creditor's gross income has declined in recent years and that he does not realize excess profits.[54]

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[52]Lynch, *supra* note 48, at 606.

[53]Malcolm, *supra* note 46, at 33.

[54]*An Empirical Study of the Arkansas Usury Law: "With Friends Like that . . .",* 1968 U. ILL. L. FORUM 544, 561 [hereinafter cited as *Arkansas Empirical Study*]. *See generally* CHAPMAN & SHAY, *supra* note 19, at 21.

A study of the cost of revolving credit in California for Sears, Roebuck & Co. for the fiscal year ending January 31, 1971, prepared by the accounting firm of Touche, Ross & Co., shows that Sears actually lost money on its revolving charge accounts. The study showed Sears' revenues from credit service charges at $27,750,000, while costs rose to $30,021,000, a net loss of $2,271,000. In percentage terms, costs exceeded

The most important fact to note here is that *creditor profit levels appear to remain substantially the same regardless of the rate ceilings.*[55] Former Senator Paul H. Douglas, the father of Truth-In-Lending and one of the foremost pro-consumer spokesmen in the country, has appropriately noted that

> [f]inance companies and other lenders have a way of earning about the same level of profit regardless of rate ceilings. There is no evidence that high rate ceilings lead to high profits and, in fact, the evidence tends to suggest just the opposite. Alabama finance companies have the highest small loan rates in the country, but one of the lowest profit rates. Likewise, Massachusetts finance companies have one of the lowest rate ceilings but one of the highest profit rates.[56]

Senator Douglas's analysis is substantiated by a recognition of the economic forces at work in the consumer credit market. Where a reasonable profit can be obtained, having in mind the cost of credit, overhead and fixed expenses, and the risk of nonpayment, "there is an independent drive by those in the business to sell."[57] Where there is an opportunity for profit, and a demand to be served, capital, almost by a process of natural selection, will be found to supply the demand. In other words, in areas where lower rate ceilings are imposed, credit vendors will concentrate on low risk customers. On the other hand, where rate ceilings are relaxed, creditors will move into higher risk markets.

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revenues by 8.2 percent. Also, J. C. Penny Company's credit costs exceeded credit service charge revenues by $22,700,000 in 1969 and by $20,500,000 in 1970.

A survey of 15 retailers, ten having annual gross sales of over $10 million and five with annual gross sales of less than $5 million for the year 1967, confirms the point being made here. "The 15 retailers surveyed collected about $36.5 million in credit service charge revenues during 1967, but incurred credit costs totalling $51.2 million, leaving a deficiency of revenue of $14.7 million. Roughly half of the deficiency originated in 30-day charge accounts, and the other half was attributable to revolving credit accounts, with the conventional installment accounts slightly above a break-even basis in the aggregate." NATIONAL RETAIL MERCHANTS ASSOCIATION, *supra* note 18, at 22, 53.

These findings of a deficiency of credit services revenues as compared with credit service costs are confirmed by recent studies in several states. Connecticut: ARTHUR ANDERSON & CO., STUDY OF FINANCE CHARGES AND RELATED EXPENSES OF REVOLVING CREDIT ACCOUNTS OF FOUR CONNECTICUT RETAILERS (1972); Iowa: PEAT, MARWICK & MITCHELL, DETERMINATION OF CREDIT REVENUE AND RELATED COSTS (1971); Minnesota: ERNST & ERNST, RETAIL CREDIT OPERATIONS STUDY (1971); Utah: R. STUCKI, UTAH CONSUMER CREDIT REPORT (1970).

[55]CHAPMAN & SHAY, *supra* note 19, at 143.

[56]Statement of Senator Paul H. Douglas to the Massachusetts Legislature, January 29, 1969.

[57]Felsenfeld, *supra* note 13, at 935.

Carl Felsenfeld has accurately summarized the existing economic realities as follows:

> It appears that, regardless of the prevailing rate levels applicable to lenders, and they do vary considerably, profit margins show a surprising equality. The type of borrowers serviced does, however, vary markedly depending upon applicable rates. The conclusion drawn is that higher rates do not necessarily increase lender profit. They do enable higher cost (both lower balance and higher risk) loans to be made and thereby broaden the coverage of the credit industry. The prevailing current view, based upon available data, is that probably the single most important function of rate regulation is to determine the size and nature of the borrower market. The higher the rate, the broader the market. Conversely, where rates are set too low, legitimate lenders depart first from the higher cost, higher risk loans. The more necessitous borrowers, those least able to protect themselves, are then inevitably forced to illegal lenders.[58]

In short, low rate ceilings eliminate consumers from the market; they do not decrease creditor profits.

4. *18 Percent Does Not Mean $18 Per $100 Per Year*

Another widely held misconception is that the rate disclosed under the Truth-In-Lending Act indicates the number of dollars per $100 of principal indebtedness paid by the debtor each year. For example, many people believe that an 18 percent APR disclosed on a revolving charge account monthly statement means that the debtor actually pays $18.00 per $100 per year. This is simply not so.

Part of the problem here relates back to the distinction made earlier between simple interest rates and add on rates. 18 percent add on is $18.00 per $100 per year. However, 18 percent simple, or 18 percent APR, is at an absolute maximum $10.02 per $100 per year.

This point is best illustrated by a simple example under a commonly used 18 percent APR revolving charge plan. A consumer buys merchandise costing $100 and plans to pay on the revolving charge plan over a period of one year. If the consumer makes the $10.00 minimum monthly payments required by the plan, he will have fully paid for the merchandise after twelve months. At the end of that time, how much will he have actually paid in finance charges? Not $18.00, not $10.00, but $9.02. On this typical revolving charge plan, the twelve month repayment schedule at 18 percent APR costs the consumer only $9.02 in

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[58] *Id.* at 936.

finance charges. The following chart was the actual method of calculation:

	Initial Purchase	Monthly Payment	1½%-Finance Charge on Previous Balance	Consumer's Balance After Payment
1	$100.00	$0	$0	$100.00
2		10.00	150.00	91.50
3		10.00	137.00	82.87
4		10.00	124.00	74.11
5		10.00	111.00	65.22
6		10.00	.98	56.20
7		10.00	.84	47.04
8		10.00	.71	37.75
9		10.00	.57	28.32
10		10.00	.42	18.74
11		10.00	.28	9.02
12		9.02	0	
			9.02[59]	

5. *The Cost Components of Small Loans Must Be Considered*

There are three basic cost components in any small loan. These are (1) the cost of money, (2) the lender's fixed overhead expenses, and (3) the risk of default.[60] No lender can with impugnity ignore these costs in setting the prices on the loans he makes. Likewise, no regulatory body can afford to ignore these costs in imposing ceilings on the lender's prices.

When faced with an unreasonably low rate ceiling, the lender will lower the only one of these three cost components over which he has much control: the risk cost. He will do this by lending only to low risk consumers. Where rate ceilings are higher, the risk which the lending industry can afford to take is correspondingly higher. Here again, the raising or lowering rate ceilings does not affect creditor profits nearly as much as it affects the *availability of credit* and the *number of consumers eligible for credit.*

Low rate ceilings are invariably justified on the grounds that they protect the consumer. The foregoing analysis demonstrates that this is simply not the case. Rather, the only people protected by low rate ceilings is that small group of borrowers who, were it not for the rate

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[59]American Retail Federation, *Facts and Figures About Revolving Credit,* 1972, at 5.

[60]*Arkansas Empirical Study, supra* note 54, at 561-62; Benfield, *supra* note 11, at 826-30.

ceiling, would probably have been required to pay a slightly higher rate, but are sufficiently creditworthy to receive credit at the ceiling rate.[61]

6. *Rate Ceilings Are Social Judgments, Not Rate Regulators*

When viewed in light of the economic realities involved, rate ceilings, rather than being regulators of the true rates charged for consumer credit, must be seen as social judgments concerning the kinds of people entitled to credit.[62] As former Senator Douglas has put it:

> [T]he question of the proper rate ceiling is really a matter of social policy rather than a contest between creditors and consumers. At what point does a rate become so high that society expresses the judgment that it is unconscionable and that the individual must do without the credit rather than pay the unconscionably high rates?[63]

This question is difficult enough to answer in the theory. It becomes even more difficult in view of the fact that the persons called upon to provide the answer are almost never the individuals who will be directly affected by the decision. Those making the decision are thus put in the posture of passing judgment on the needs and wants, not of themselves, but of others. They are evaluating the needs and wants of people who live under conditions, and come from socio-economic backgrounds, which usually are totally foreign to the decision-makers. The development of pluralism in this country and the marked increase in recent years in suspicion and distrust between and among ethic and socio-economic groups should have, by now, forever demonstrated the unwisdom of passing such judgments. Subject only to the outside limits of conscionability, we believe the only safe course to follow is to let the consumer seeking the credit make the decision for himself as to whether or not he will pay a high rate.

D. The Arkansas Experience

By way of contrast to the hodgepodge rate structure currently prevailing in Mississippi, the neighboring state of Arkansas by constitutional provision imposes a simple uniform rate ceiling of ten percent.[64] All consumer loans and credit sales are subject to this limitation. There are no exceptions.

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[61]Johnson, *The New Law of Finance Charges*, 33 LAW & CONTEMP. PROB. 671, 684 (1968); Johnson, *Interest and Usury*, in R. JOHNSTON, *supra* note 46, at 16.

[62]Douglas, *supra* note 56; Malcolm, *supra* note 46, at 34; Benfield, *supra* note 13, at 833, 874.

[63]Douglas, *supra* note 56.

[64]ARK. CONST. art. XIX, § 13 (1874). *See also* ARK. STAT. ANN. §§ 68-603, 68-609 (1957).

In vetoing the credit card rate bill, Governor Waller cited Arkansas as one of the states having lower rates than Mississippi.[65] Taking the Governor's cue, Arkansas with its low rate ceiling should provide a unique opportunity for evaluating the effectiveness of a low rate ceiling. In particular, it is interesting to see whether the low rate ceiling in Arkansas in fact affords the consumer much protection.

The Arkansas experience provides empirical verification of the economic principles discussed above. The following facts support this conclusion.[66]

First, many of the national small loan companies and finance companies simply choose not to do business in the state of Arkansas. This is so because of the "unlikelihood of a profitable operation under the 10 percent ceiling.[67] In fact, the 10 percent rate ceiling is the sole reason for the absence of one large national loan company from the state of Arkansas.[68] Therefore, the Arkansas experience indicates that low rate ceilings do restrict the availability of credit.

Another of the principles stated above is that, where creditors continue to do business under heavy rate restrictions, they will obtain a reasonable profit from some other source or by some other name. In Arkansas, credit insurance has been the primary vehicle whereby additional revenues have been obtained by lenders. A recent survey indicates that

> Little Rock lenders, especially loan company officials, were quick to point out their need to employ the credit insurance sale as a revenue-producing device—either for the lender's commission as agent for an independent insurer, or for the profit on the premium in cases where the lender is its own insurer. . . . Not only are the insurance charges higher in Arkansas, but the Little Rock lenders to some extent use property insurance solely as a revenue-producing devise.[69]

Another way through which Arkansas creditors legally earn the profit, which the constitutional rate ceiling denies, is through increased retail prices. A recent survey comparing Little Rock prices for major appliances with prices prevailing in the states surrounding Arkansas supports this conclusion.

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[65]Veto Statement, *supra* note 5.

[66]The discussion that follows rests largely upon two comprehensive articles dealing with the Arkansas situation. *Arkansas Empirical Study, supra* note 50; Lynch, *supra* note 45. The brief summary presented here is in no way a substitute for a careful reading of both of these articles. *See also Williams,* AN ANALYSIS OF RETAIL CREDIT COSTS OF SELECTED RETAIL STORES IN ARKANSAS (1970).

[67]*Arkansas Empirical Study, supra* note 54, at 574.

[68]*Id.*

[69]*Id* at 575.

COMPOSITE PRICE INDEX FOR MAJOR APPLIANCES, LITTLE ROCK AVERAGE PRICE – $100[70]

Little Rock, Arkansas	$100.00
Texarkana, Texas–Arkansas	95.88
Monroe, Louisiana	96.43
Greenville, Mississippi	96.66
Memphis, Tennessee	92.60
Springfield, Missouri	97.05
Tulsa, Oklahoma	93.09
Denver, Colorado	96.72

Next, the Arkansas experience indicates that unrealistically low rate ceilings force border city merchants to move out of state. Consider the Texarkana example. That city has 52,169 people, 21,682 of whom live in Texarkana, Arkansas and 30,487 live in Texarkana, Texas. Texas permits an 18 percent APR to be charged as compared with the 10 percent APR ceiling in Arkansas. The following table[71] strongly indicates that the Arkansas rate ceiling has forced many merchants across the state line to Texarkana, Texas.

THE LOCATION OF SELECTED RETAIL FIRMS IN TEXARKANA ARKANSAS-TEXAS FOR THE SELECTED YEARS 1955-1970

Year	Automobile Dealers		Furniture & Appliance Dealers		Department Stores	
	TA*	TT**	TA	TT	TA	TT
1955	13	25	11	20	4	3
1957[72]	10	27	14	22	3	3
1960	9	26	8	21	5	4
1962	9	25	9	17	5	4
1964	7	31	7	17	5	4
1965	5	32	8	18	5	4
1967	6	35	8	20	5	6
1969	5	37	6	23	4	6
1970	4	39	6	25	4	8

*Texarkana, Arkansas
**Texarkana, Texas

[70]Lynch, *supra* note 48, at 599.

[71]This table was prepared by Dr. Gene C. Lynch, Associate Professor of Finance, University of Arkansas. The source of data was the telephone directories for Texarkana, Arkansas-Texas for the years indicated.

[72]Strict enforcement of the 10 percent APR rate ceiling for consumer credit sales in Arkansas did not really begin until after the decision of the Supreme Court of Arkansas in *Sloan v. Sears, Roebuck & Co.*, 228 Ark. 464, 308 S.W. 2d 802 (1957).

The resulting loss of merchants has many secondary effects. Employment opportunities move to the neighboring state. Sales tax revenues are lost. People cross the state lines. In short, the entire economic development of a border community may be retarded by unrealistically low rate ceilings.

In summary, the following conditions currently exist in the State of Arkansas: (1) There is substantially less consumer credit available than in surrounding states. (2) Lenders in Arkansas utilize various devices, principally credit insurance, to evade the usury limitation and to produce a major portion of their revenues in consumer credit transactions. (3) Retail prices in Arkansas are significantly *higher* than in neighboring states. (4) Border city merchants are gradually "encouraged" to move out of the state. It is difficult to believe that any of these conditions are of any benefit to the consuming public. It is equally difficult to quarrel with the conclusion that the proximate cause of the existence of these conditions is the unreasonably low rate ceiling in the state of Arkansas.[73]

III. Rate Regulation Under the Uniform Consumer Credit Code

A. Rate Ceilings

The Uniform Consumer Credit Code[74] is fundamentally a socio-economic document. Its rules constitute social judgments made within the framework of economic fact and reality. Its draftsmen accepted the proposition that there are certain immutable economic laws with which the state cannot tamper, without producing substantial inequities. The

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[73]A study recently made in the state of Washington supports the same general conclusions. Touche, Ross, Bailey & Smart, Study of Consumer Credit Costs in Retail Stores in Washington (1967). *See also* R. Stucki, Utah Consumer Credit Report (1970). Washington is another state cited by Governor Waller as having more acceptable rate ceilings. In 1968 Washington passed a law which reduced the credit service charge permissible in consumer credit sales from 18 percent APR to 12 percent APR. A recent study of the effect of this reduction in rate ceiling reveals that (1) the availability of credit has been reduced; (2) the price of credit has increased as the result of new credit related charges; (3) many consumers have been forced to seek more costly sources of credit; (4) the price of merchandise has increased; and (5) charges are being made for items and services previously provided without cost. Graduate School of Business Administration of the University of Washington, The Impact of a Consumer Credit Interest Limitation Law, Washington State: Initiative 245 (1970).

[74]The UCCC generally covers all consumer credit transactions involving $25,000.00 or less. UCCC §§ 2.104 (1), 3.104 (1). The $25,000.00 limitation, however, does not apply to a sale, loan or lease involving land. Still, the great mass of real estate credit transactions will be exempted from the regulatory provisions of the UCCC. Sections 2.104 (2) (b) and 3.105 exempt sales and loans involving an interest in land where the credit service charge of loan finance charge does not exceed 10 percent per annum.

UCCC rests upon the premise that, in the area of rates, the most effective and most equitable protection which can be afforded the consumer is found in a competitive market place.[75]

The UCCC is strictly a free enterprise statute. There are three major facets of the UCCC which are designed to promote this policy. These are (1) *rate ceilings* on the maximum finance charges allowable,[76] (2) the *freedom of entry* concept designed to increase the number of sources of credit available,[77] and (3) *disclosure* of the cost of credit.[78] Restrictive rate controls are replaced by competition in the market place as the consumer's protection against excessive rates and prices.

In the UCCC, the concept of usury has been abandoned. Rate ceilings are imposed on consumer credit extension, but, as explained below, the purpose of these ceilings is by and large unrelated to the regulation of the cost of money. The draftsmen have taken the economically sound position that money is a commodity, just like an automobile or a television set, and that its cost should be determined by the forces of competition. Accordingly, the UCCC would repeal altogether the general

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With regard to the $25,000.00 ceiling just mentioned, as well as other dollar amounts mentioned in the UCCC, an escalation formula is provided in the event of continued inflation. Section 1.106 provides that such dollar amounts in the UCCC increase 10 percent when there is a 10 percent jump in the Consumer Price Index, using December, 1967, as the Reference Base Index. In December, 1967, the Index was 118.2 The Index now being released monthly by the Bureau of Labor Statistics, U.S. Department of Labor, has been revised so that it is based on 1967=100. As of June, 1972, the Index stood at 125.0 on the base 1967=100 and 145.4 on the base 1957-59=100. In either event, the increase is more than 20 percent over the December, 1967 Index. Accordingly, the $25,000.00 limitation would be increased to $30,000.00. Other dollar limitations that would likewise be increased will be appropriately noted.

[75]For a series of studies indicating that competition operates as a fairly effective check on finance charges in most consumer credit transactions, see Jung, *Charges for Appliance and Automobile Installment Credit in Major Cities,* 35 J. OF BUS. 386-91 (1962); Jung, *Commercial Bank Charges in New York and Ontario,* 3 NAT'L BANKING REV. 397-408 (1965); Jung, *Dealer Pricing Practices and Finance Charges for New Mobile Homes,* 36 J. OF BUS. 430 (1960); Jung, *Terms of Home Improvement Loans,* 2 NAT'L BANKING REV. 51-60 (1964); Schweiger & McGee, *Chicago Banking,* 34 J. OF BUS. 203, 255-70 (1961).

[76]UCCC §§ 2.201, 2.207 (3), 3.201, 3.508 (1969). There are a number of discussions of the UCCC rate ceilings concept available. *See* note 13 *supra.*

[77]UCCC § 3.503 (1969). *See generally* Shay, *supra* note 48, at 491; NATIONAL CONFERENCE OF COMMISSIONER ON UNIFORM STATE LAWS, PROPOSED "FREEDOM OF ENTRY" AMENDMENTS TO UNIFORM CONSUMER CREDIT CODE — SPONSORS' REPLY (1968).

[78]UCCC §§ 2.302, 2.306, 3.302, 3.306 (1969). For comprehensive discussions of disclosure generally, *see* Jordan and Warren, *supra* note 13, at 408-17; Kripke, *supra* note 13, at 455-69. For a discussion and evaluation of disclosure in Mississippi by the present author *see* Robertson, *Consumer Protection, supra* note 8, at 43-53.

usury limitation of the state where it became law.[79] With respect to non-consumer credit transactions, lenders and their borrowers would find themselves in a completely unrestricted situation where they are free to bargain and contract for whatever rate they may find mutually acceptable.[80] And why should not this be so?

The draftsmen of the UCCC encountered a hodgepodge of rate regulation statutes in practically every state in the Union.[81] In response, the UCCC promulgates a relatively simple and, with a few notable exceptions,[82] uniform rate schedule designed to be economically feasible and to be sufficiently high to permit competition in the market place to be the primary regulatory factor.

Under the UCCC the term "interest" is no longer used. Rather, the concept of the finance charge, found in the Truth-In-Lending Act, has been adopted. However, the UCCC still makes a distinction between consumer loans and consumer credit sales, so that the term "loan finance charge"[83] is used in the case of consumer loans and the term "credit service charge"[84] is used in the case of consumer credit sales. For convenience here, these terms will be grouped together under the general term "finance charge."

In general, the UCCC includes within the finance charge all charges which are imposed by the creditor and payable by the consumer as a condition of the extension of the credit. In talking about maximum rates allowable, therefore, it should be kept in mind that the UCCC includes not only interest but also all other charges in computing the Annual Percentage Rate.[85]

The general rate which creditors are allowed to charge under the UCCC is 18 percent.[86] Any business entity operating in the consumer credit field can charge for credit a finance charge not exceeding 18 percent without first obtaining a license from the administrator. These people are called "regulated lenders."[87]

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[79]House Bill No. 256, (1972 Reg. Sess.).

[80]UCCC §§ 2.605, 3.605.

[81]NATIONAL CONSUMER FINANCE ASSOCIATION, CONSUMER FINANCE RATE AND REGULATION CHART (1970).

[82]The most notable exception is the unexplained difference in the rate ceiling for finance charges for revolving charge accounts [UCCC § 2.207 (3)] and the ceilings set for finance charges for revolving loan accounts [UCCC § 3.201 (4)].

[83]UCCC § 3.109; compare 15 U.S.C. § 1605 (a) (1970).

[84]UCCC § 2.109; compare 15 U.S.C. § 1605 (a) (1970).

[85]UCCC §§ 2.304 (2), 3.304 (2); compare 15 U.S.C. § 1606 (a) (1) (1970).

[86]UCCC § 3.201 (1).

[87]UCCC § 3.501 (1) - (2).

Those desiring two charge rates in excess of 18 percent must apply to the UCCC administrator[88] for a license as a "supervised lender."[89] Banks and other financial institutions which are already subject to substantial regulation are exempt from this requirement and are deemed to be supervised lenders as a matter of law. All supervised lenders are permitted to charge a rate not to exceed 36 percent[90] for loans not exceeding $300.00, a rate not to exceed 21 percent for that part of a loan more than $300.00 and less than $1,000.00, and a rate not to exceed 15 percent for that amount of the loan over $1,000.00.[91] However, supervised lenders making substantial loans may charge a maximum of 18 percent without regard to the 15 percent limitation just noted.[92]

Merchants and retail salesmen are subject to the same rate limitations. In a consumer credit sale, the maximum finance charge which may be imposed is at the rate of 36 percent per year for the first $300.00 of the indebtedness, 21 percent up to $1,000.00 and 15 percent over and above $1,000.00 or a flat 18 percent whichever rate proves to be greater under the circumstances of the particular transaction.[93]

The following table reflects a comparison of interest limitations under existing Mississippi law with the rate ceilings which would be in effect under the UCCC:

EXISTING LAW	UCCC
GENERAL USURY LIMITATION	
8% "add on,"[94] or 14.5% APR	10.02% "add on," or 18% APR
MONTHLY INSTALLMENT LOANS	
6% "add on," or 11% APR	Up to $300.00, 20.55% "add on," or 36% APR; $300.00 to $1,000.00, 11.74% "add on," or 21% APR; Over $1,000.00, 8.31% "add on," or 15% APR; Or 10.02% "add on," or 18% APR, *whichever is greater*

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[88]The powers of the administrator with respect to supervised lenders are set forth in UCCC § 6.105.

[89]UCCC § 3.501 (3) - (4).

[90]UCCC § 3.508 (2). A 36 percent APR does not authorize a finance charge of $36.00 per $100.00 per year. On a 12 month installment loan of $100.00 at 36 percent APR, the finance charge would be only $20.48.

[91]*Id.* Under the escalation clause, note 74 *supra,* the $300.00 will probably be $360.00 and the $1,000 figure will probably be $1,200.

[92]UCCC § 2.201 (2); *see* note 91 *supra.*

[93]*Id.*

[94]An argument can be made that an 8 percent "add on" rate (14.5 percent APR) is permissible under the Mississippi usury statute MISS. CODE ANN. § 36 (Supp. 1971).

EXISTING LAW	UCCC
SMALL LOANS	
On loans over $100.0, 2% per month "add on," or 41.69% APR	Same Rates as Above
SALES OF NEW AUTOMOBILES	
7% "add on," or 12.75% APR	Same Rates as Above
USED CAR SALES	
Two Year Old Cars	
10% "add on," or 18% APR	Same Rates as Above
Four Year Old Cars	
13% "add on," or 23.25% APR	Same Rates as Above
Cars Over Four Years Old	
15% "add on," or 26.5% APR	Same Rates as Above
RETAIL INSTALLMENT SALES	
No maximum; under present case law time price differential may be whatever the buyer will pay	Same Rates as Above
CREDIT UNIONS	
1% per month "on unpaid balance," or 12% APR simple interest, or 21.5% APR "add on" interest[95]	Same Rates as Above
LENDER CREDIT CARDS[96]	
Rate usually charged is 1½% per month, or 18% APR	Same Rates as Above

The statute is arguably ambiguous in that it does not spell out the method by which the 8 percent rate is to be computed. Also, there are cases providing that the payment of maximum interest in advance of the maturity of an obligation does not constitute usury. Hood v. First Nat'l Bank, 208 Miss. 658, 45 So.2d 251 (1950); Beck v. Turner, 147 Miss. 401, 113 So. 209 (1927); Kornegay v. Georgia State Bldg. and Loan Ass'n, 91 Miss. 551, 44 So. 783 (1907). This proposition, insofar as it might apply to "add on" interest in excess of 6 percent (11 percent APR) but less than 8 percent (14.5 percent APR) is questioned by implication in Fayard v. Paris, 254 So.2d 773 (Miss. 1971). "Add on" computation is also rather difficult to reconcile with Taylor v. Copeland, 183 Miss. 85, 181 So. 742 (1938). Except as authorized under express statutes, e.g., Miss Code Ann. §§ 5212 and 5590 (Supp. 1971), it would be prudent to assume that "add on" computation is prohibited under the general usury statute.

[95]Though the contrary is arguable, the statute [MISS. CODE ANN. § 5410 (1956)] is worded so that "add on" computation is probably prohibited. Compare 12 U.S.C. § 1757(5) (1970).

EXISTING LAW	UCCC
SELLER CREDIT CARDS[97]	
Rate usually charged is 1½% per month, or 18% APR	2% per month, or 24% APR up to $500.00 of debt; 1½% per month, or 18% APR over $500.00 of debt

All finance charge rates contained in the UCCC are computed by the actuarial or "simple interest" method. This conforms to the APR computations required under the Truth-In-Lending Act. A prevalent practice under existing Mississippi law is to use the "add on" method of computing rates. It is important to keep this distinction in mind in comparing the UCCC with existing law.

The most telling comparison appears in the small loan area. Present law authorizes a rate of 2 percent per month add on.[98] This rate produces an APR of 41.69 percent! This rate ceiling applies, *regardless of the size of the loan.* The UCCC, on the other hand, authorizes a maximum rate of 36 percent, but after the first $300 drops the ceiling to 21 percent for additional sums more than $300 but less than $1,000 with a further reduction to 15 percent required over $1,000.

The following table graphically illustrates the potential difference between the maximum rates and maximum finance charges permissible under the UCCC compared to existing Mississippi law.

COMPARISON OF RATE CEILING UNDER UCCC AND PRESENT MISSISSIPPI LAW[99]

(12-month installment loans)

	Loan Size				
	$100	$300	$500	$1,000	$1,500
Present:	$ 24.00	$ 72	$120	$240	$360
APR	% 41.69	% 41.69	% 41.69	% 41.69	% 41.69
UCCC:	$ 20.48	$ 61.68	$ 93.88	$158.36	$211.68
APR	% 36.00	% 36.00	% 33.02	% 28.05	% 25.10
Net Difference	$ 3.52	$ 10.32	$ 26.12	$ 81.64	$148.32

[96]*E.g.,* BankAmericard, Master Charge. As with other "lenders," these credit card companies would have to qualify as "supervised lenders" before they could charge in excess of 18 percent per annum on small balances.

[97]*E.g.,* Sears Revolving Charge.

[98]MISS. CODE ANN. § 5591-09 (b) (1956).

[99]This table was prepared by Dr. Robert W. Johnson, Professor of Industrial Administration, Purdue University, and was presented to the Mississippi House Judiciary "A" Committee at hearings on the UCCC on March 1, 1972.

Legislative controversy is certain to result when the rate ceilings provisions of the UCCC are considered. However, in view of the fact that the consumer today is regularly required to pay almost 42 percent APR under the present small loan laws of this state, with the possibility of rates in excess of that under the time price doctrine, opposition to the UCCC rate ceiling concept in Mississippi would seem to be a bit misplaced.

Furthermore, the draftsmen of the UCCC vigorously advance their belief that rates actually charged by creditors will be nowhere near the ceiling permitted under the new law. They argue that competition will keep the rates actually being charged well below ceilings. They argue that, if a debtor is charged the maximum rate, this will be because of his lack of creditworthiness alone. Initial reports from Utah[100] and Oklahoma, the first two states to adopt the UCCC, seem to support this theory. In any event, whether this actually takes place in Mississippi or not, the new rate ceilings concept of the UCCC, when compared with the oligopolistic hodgepodge of present Mississippi law, represents a substantial advance.

B. Freedom of Entry

Free entry into the consumer credit market must be available if the free enterprise system and competition are to keep rates below the maximum levels just discussed. Freedom of entry, coupled with full and adequate disclosure of the cost of credit, should have this desired effect.[101]

Under the UCCC, persons engaging in the business of making supervised loans (finance charge in excess of 18 percent) need to be licensed, unless already a supervised financial organization such as commercial banks, savings banks, savings and loan associations and credit unions. This license is granted by the Administrator upon a finding that the financial responsibility, character and fitness of the applicant warrant belief that the business will be operated honestly and fairly.[102] The license is permanent and allows the licensee to do business in more than one office.

For all practical purposes, Mississippi is a free entry state under existing law. When the licensing requirements of our Small Loan Privilege Tax Act[103] are compared with the freedom of entry provisions of the UCCC, it is readily apparent that they are substantially similar. Accord-

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[100]STUCKI, UTAH CONSUMER CREDIT REPORT 12-13, 30, 33, 40-41, 61-78 (1970).

[101]UCCC § 3.503, official comment.

[102]UCCC § 3.503 (2).

[103]MISS. CODE ANN. § 5591-39 (Supp. 1971); UCCC § 3.503.

ingly, we do not believe that the free entry provisions of the UCCC would represent a substantial change from existing state laws.

It should be noted that by regulation, the State Bank Comptroller has attempted to require that before a license may be issued the applicant must demonstrate that "the granting of such license will promote the convenience and advantage of the community in which the licensed office is to be located."[104] Since the statute[105] requires only that the applicant demonstrate "financial responsibility, previous experience, character and general fitness," the regulation, which substitutes an entirely new test, is probably illegal and unenforceable.

Freedom of entry is necessary under the UCCC in order to assure the availability of an adequate supply of credit. Because of the strong consumer reforms in the area of practices and remedies, some creditors in Mississippi now take the position that, if the UCCC becomes law, they will stop extending credit to persons considered to be marginal credit risks. In this way, it is argued, the UCCC would hurt the consumer, not help him. The Code free entry provisions are designed so that, if some existing creditors do become more restrictive in their credit practices, the field will be open to others, who can demonstrate financial responsibility, character, and fitness, to fill the vacuum. In the long run, the propensity of capital to seek profits will prevent creditor's from becoming too conservative. As explained above, the history of our capitalistic economy reflects that opportunities for investment and profit are seldom overlooked for long.

C. Disclosure

Disclosure of the cost of consumer credit is the third component of the UCCC free enterprise theory. The consumer can shop for credit most effectively when the costs of credit are disclosed to him in simple, meaningful terms. As explained above, the Truth-In-Lending Act establishes a uniform method of computing and disclosing finance charges and rates. Thus, comparison shopping is at least "possible" today.[106]

The Truth-In-Lending Act contains a provision which authorizes the Federal Reserve Board to grant exception from compliance with the federal act to any state with a similar disclosure act containing adequate

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[104]State Bank Comptroller Reg. II (a), adopted Nov. 7, 1966. *Compare* UCCC § 3.503, official comment no. 1.

[105]Miss. Code Ann. § 5591-39 (Supp. 1971).

[106]The author is under no illusion that disclosure is that be-all and end-all of consumer credit reforms. For a further discussion, *see* Robertson, *Consumer Protection, supra* note 8, at 49-52.

provisions for enforcement.[107] The UCCC disclosure rules are designed to be sufficiently similar to the Truth-In-Lending Act to permit this exemption to be granted.

Whether we adopt the UCCC or not, the disclosure law is here to stay. The only decision for Mississippi as a practical matter, is whether compliance with the disclosure law will be policed by a strong federal administrator or by a strong state administrator. Anyone who advocates the enactment of the UCCC expecting that he will thereby be able to avoid compliance with the Truth-In-Lending disclosure requirements is extremely shortsighted. As indicated above, the UCCC disclosure requirements are practically identical to those found in the federal law.

D. Competition as Regulator

Mississippi has historically considered the economic rules of a free enterprise system with great reverence.[108] Still, there will no doubt be many skeptics who will question the efficacy of economic competition as a rate regulator. Because Mississippi has in the past "controlled" rates by an awkward array of statutory limitations, empirical proof is lacking. There are, nevertheless, several indicators which ought to be considered.

First, as indicated above, the time-price doctrine is legally structured so that it contains no rate limitations. Literally, the sky is the limit. Bear in mind that retail installment sellers not only are exempt from rate limitations but also are answerable to no administrator or policing authority. For this particular credit vendor, the forces of competition in the market place are the sole regulator. It is doubtul that a survey of retail merchants in this state would reflect appreciable rate abuse. There will be found few if any instances where rates are being imposed anywhere near the 41.69 percent APR commonly used by the heavily regulated small loan companies.

Second, competition has proven itself an effective regulator of rates in the automobile finance industry.[109] Though Mississippi has relatively low statutory ceilings for automobile finance charge rates, competition has generally kept rates below the ceilings. To some extent, the picture has been obscured by inflation, but it seems likely that finance company profits have not suffered. Rather, the rate ceilings have been avoided through such devices as "add on" rate computation, higher re-

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[107]15 U.S.C. § 1633 (1970).

[108]It must be recognized that a usury statute is the complete antithesis of free enterprise economics.

[109]R. SHAY, NEW AUTOMOBILE FINANCE RATES, 1924-62, at 11 (1963); *cited in* Shay, *supra* note 48, at 491-92.

tail prices, use of extras such as credit insurance, added discounts on the negotiation of chattel paper, just to name a few. In any event, it is logical to believe that the automobile finance industry, both in Mississippi and nationwide, has been one segment of the consumer credit economy where competition has proven itself a far more effective rate regulator than arbitrary statutory rate ceilings.[110] The experience of this industry supports the proposition that rates do not rise to the statutory ceiling, even where the ceilings are relatively low.

Third, it should be instructive to study the experience of the two states which have no general usury statute: Massachusetts and New Hampshire. A recent survey has shown that rate levels generally in Boston, where there is no usury limitation, were somewhat *lower* than rates being charged in several neighboring states which have quite restrictive usury laws.[111] Here again we find evidence that the market place can be an effective regulator.

Based on experiences such as those mentioned above, the draftsmen of UCCC have devised their Code to foster a healthy, competitive atmosphere in the consumer credit industry. By assuring an adequate availability of credit and strictly enforced disclosure requirements, the market place should provide the consumer with far more protection than usury laws and low rate ceilings ever have.

E. UCCC Reforms in the Law of Remedies and Practices

As a socio-economic document, the UCCC has been designed to strike a fair and realistic balance between the competing interests affected. Accordingly, there are, in addition to the rate competition theory stated above, a number of major reform provisions throughout the Code designed to protect the consumer. These lie primarily in the areas of creditor practices and remedies.[112]

One of the consumer protection provisions of the new Code is found in the abolition of the holder in due course doctrine in consumer credit

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[110]The National Commission on Consumer Finance is presently engaged in the compilation of extensive data, on a state by state basis, concerning the behavior of rates vis-a-vis statutory rate ceilings. Mississippi is included in that study. Final results of the commission's study are expected to be released on or about January 1, 1973.

[111]Benefield, *supra* note 11, at 839 n. 102.

[112]The UCCC reforms in the law of remedies and practices have been thoroughly evaluated by the author elsewhere. Robertson, *Consumer Protection, supra* note 8, at 52-75. That discussion, properly speaking is beyond the scope of the present article. The material presented here is intended to be nothing more than a highlighting of the major consumer credit reforms, found in the UCCC designed to illustrate the Code's balance.

transactions.[113] The closely related waiver of defense clause meets a similar fate.[114]

In the case of a home solicitation sale, the buyer is given the right to cancel the same until midnight of the third business day following the sale.[115] In an effort to deal with referral sales schemes frequently practiced by door-to-door salesmen, the new Code provides that the seller may not give or offer a rebate or discount as an inducement for a sale if the earning of the rebate or discount is contingent upon the occurrence of an event subsequent to the time of the sale.[116]

The UCCC contains rules designed to curb the greediness of some creditors. Except in the case of a purchase money security interest or a security interest in goods arising out of an earlier consumer credit sale between the parties, the seller of goods may take a security interest in goods or lands of the debtor, other than the goods which are the subject of the sale, only if the debt secured is substantial.[117] The additional goods can serve as security only where the debt secured is greater than $300.00.[118] And, in the case of a consumer credit sale or in the case of a supervised loan, the creditor may not take a security interest in real estate if the debt secured is less than $1,000.00.[119] Any security interest taken in violation of these rules is void.

Deficiency judgments are greatly restricted under the UCCC.[120] The new Code gives the foreclosing creditor an option. He may repossess the collateral, or he may sue on the underlying note which he holds, but he may not do both. Here the Code rules apply only to consumer credit sales and do not cover consumer loans.

The UCCC contains a number of provisions designed to protect the wages of the consumer.[121] Pre-judgment garnishments are flatly prohibited.[122] Further, 75 percent of the consumer's disposable earnings are

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[113]UCCC § 2.403.

[114]UCCC § 2.404. *See also* Robertson, *Consumer Protection, supra* note 8, at 52-59.

[115]UCCC § 2.502. *See also* Robertson, *Consumer Protection, supra* note 8, at 60-64.

[116]UCCC § 2.411. *See also* Robertson, *Consumer Protection, supra* note 8, at 64-65.

[117]UCCC § 2.407. *See also* Robertson, *Consumer Protection, supra* note 8, at 65-67.

[118]This amount is subject to change pursuant to the provision on adjustment of dollar amounts. *See* note 74 *supra.*

[119]This amount is subject to change pursuant to the provision on adjustment of dollar amounts. *See* note 74 *supra.*

[120]UCCC § 5.103. *See also* Roberston, *Consumer Protection, supra* note at 8, at 68-70.

[121]UCCC §§ 5.104, 5.105, 5.106, 2.410. *See also* Robertson, *Consumer Protection, supra* note 8, at 70-75.

[122]*See* Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). Present Mississippi law prohibits pre-judgment garnishments. Miss Code Ann. § 2783 (1956).

exempt from levy. Irrevocable assignments of earnings are banned, employers are prohibited from discharging an employee because of a garnishment arising out of a consumer credit transaction.

In addition, confession judgment are banned.[123] There are rules designed to protect the consumer against excessive delinquency charges[124] or other additional charges.[125] Other rules restrict and control the practice of refinancing,[126] while still others insure that the consumer can pre-pay his debt at any time without penalty.[127] The UCCC also regulates balloon payments[128] and contains needed protections for the consumer signing a balloon note. Limitations on the default charges[129] and attorneys' fees[130] in the event of foreclosure or other default proceedings by the creditors may also be found in the UCCC. Extortionate extensions of credit[131] and "unconscionable" terms[132] in consumer credit transactions are also proscribed. Civil[133] and criminal penalties[134] are provided for violations of the consumer protection provisions of the Code.

The presence of these and other pro-consumer reforms constitute an additional reason for the adoption of relatively high rate ceilings. Inevitably, each of these restrictions on practices and remedies will cause increased costs to the creditor.[135] The rate structure of the Code would permit the creditor to bear these increased costs, and still make a fair profit. Under the UCCC, unlike the Arkansas experience cited above, these costs would be borne entirely by credit consumers, not by cash buyers. In a very real sense, these reforms and the added costs that they produce benefit all credit consumers. It is, therefore, just and equitable that creditors be permitted to charge rates which would permit them to realize fair profits without having to resort to back-handed or evasive practices.

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[123]UCCC § 2.415. *See also* Robertson, *Consumer Protection, supra* note 8, at 67-68. Compare D. H. Overmeyer Co. v. Frick Co., 405 U.S. 174 (1972).

[124]UCC §§ 2.203, 3.203.

[125]UCCC §§ 2.202, 2.204, 3.202, 3.204.

[126]UCCC §§ 2.205, 2.206, 3.205, 3.206.

[127]UCCC §§ 2.209, 2.210, 3.309, 3.310.

[128]UCCC §§ 2.405, 3.402.

[129]UCCC §§ 2.414, 3.405.

[130]UCCC §§ 2.413, 3.404.

[131]UCCC § 5.107.

[132]UCCC §§ 5.108, 4.106.

[133]UCCC §§ 5.203, 6.113.

[134]UCCC §§ 5.301, 5.302.

[135]In the case of responsible, legitimate creditors, who make up the overwhelming majority of the consumer credit industry, most of these added costs will merely be in the form of "red tape" type expenses necessary to stay in compliance with the law.

IV. Conclusion

We end basically where we began. Consumer credit rate regulation in Mississippi is a tangled web of confusion, explainable, more in terms of a series of historical accidents, than in terms of sound economic principles. Governor Waller's call for an in-depth study of rates and for the development of proposals for the modernization of Mississippi's rate structure is a forward step. It is respectfully suggested, however, that the proposed study include a thorough consideration of the economic realities of consumer credit rate regulation. Only when the myths have been discarded can we hope to achieve true economic justice for both the consumer and his creditor.

CONSTITUTIONAL LIMITS OF STATE DEBT: THEIR EFFECTS ON INTEREST COSTS

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I. Introduction

In recent years, Mississippi has experienced difficulty in obtaining sufficient revenues to provide the expansions in the quantity and quality of public goods and services demanded by the residents of the State. As with most other states, Mississippi has raised taxes several times, but general operating revenues have remained insufficient to cover both operating budgets and expansions in capital outlays. To provide for the latter, Mississippi has been forced to resort to borrowed funds on a large scale. As a result, the State's debt has grown rapidly, and a significant portion of each year's budget is dedicated to interest requirements.[1] Economists in Mississippi in recent years have expressed interest, albeit infrequently, in the State's expenditures and in the revenue sources available to public authority in the State, but they have paid surprisingly little attention to the State's debt. This important phase of the State's economic process is also worthy of attention and that is the subject of this study.

A state's constitution may place limits on the amount of debt which that state may incur.[2] As the state approaches that limit, it is

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[1]In 1969, $15,427,000, or 2.9 percent of the State of Mississippi's total direct expenditure of $526,426,000, was allocated to interest payments on the debt. U.S. Department of Commerce, Bureau of the Census, State Government Finances in 1969, at 27 (1970) [hereinafter cited as 1969 State Finances].

[2]Mississippi has relatively liberal constitutional limitations on the amount which the State may borrow. The text of the State's constitutional debt provision is as follows:

> Neither the State nor any of its direct agencies, excluding the political subdivisions and other local districts, shall incur a bonded indebtedness in excess of one and one half (1½) times the sum of all the revenue collected by it for all purposes during any one of the preceding four fiscal years, whichever year might be higher. Miss. Const. art. 5, § 115 (as amended 1960).

In contrast, many state constitutions are quite restrictive as to the amount and purpose of state borrowing. The Alabama state Constitution, for example, provides that:

> After the ratification of this constitution, no new debt shall be created against, or incurred by the state, or its authority except to repel invasion or suppress

faced with the alternatives of (1) curtailing or not expanding the quality and quantity of public services, or (2) resorting to debt instruments which are not included in the debt ceiling. Revenue bonds provide the means of following the second alternative.[3] Revenue bonds bear a higher interest rate than general obligation bonds which have the same covenants and which are issued under similar circumstances. Obviously, to the extent that a state must rely on revenue bonds, instead of general obligation bonds, to fund projects demanded by the citizens of the state, it incurs higher interest costs. This outcome is expected because these bonds bear a higher interest rate than general obligation bonds. Debt ceilings, therefore, cause a state to pay more interest on debt than would be necessary in the absence of such limits. The above discussion reveals that constitutional limits on state debt can be a significant factor affecting the amount of interest charges paid by a state. Furthermore, since constitutional limitations are subject to modification, it may be beneficial for a state to evaluate the extent to which these restrictions cause tax monies to be directed to such non-productive uses as paying an interest rate which is *higher* than the rate which would apply if the debt ceiling were raised or completely removed. This article relates the above considerations to the State of Mississippi; and the purpose of this study is to test the hypothesis that the provisions of the Mississippi State Constitution cause the interest costs of State debt to be higher than they would be if the State were permitted to rely more heavily on general obligation bonds instead of revenue bonds for funding State

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insurrection, and then only by a concurrence of two-thirds of the members of each house of the legislature, and the vote shall be taken by yeas and nays and entered on the journals; provided, the governor may be authorized to negotiate temporary loans, never to exceed three hundred thousand dollars, to meet the deficiencies in the treasury, and until the same is paid no new loan shall be negotiated; (provided, further, that this section shall not be so construed as to prevent the issuance of bonds for the purpose of refunding the existing bonded indebtedness of the state . . .). Any act creating or incurring any new debt against the state, except as herein provided for, shall be absolutely void. . . . Ala. Const. amend. XXVI, art. 23, § 213.

For a thorough but dated explanation of the types and effectiveness of the constitutional debt provisions in other states, see J. HEINS, CONSTITUTIONAL RESTRICTIONS AGAINST STATE DEBT 28-35 (1963).

[3]Revenue bonds are issued to fund particular projects. Theoretically, the revenue from those projects are dedicated to liquidate the bond issue. In reality, earmarked taxes, certain pledged revenues, or a grant from general revenues may be used to service these bonds. General obligation bonds are secured by the credit and integrity of the state, only. It is generally considered that statutory limits to state debt apply to general obligation bonds but not to revenue bonds. These two types of bonds are discussed more fully in Section III of the paper.

debt. Findings of the study could aid State officials in their efforts to improve financial efficiency and aid in the State's economic growth.

II. Reasons for the Increasing Debt

Information concerning the size and the accelerating rate of growth of the national debt is often noted by newspapers and other mass media. Much less publicized, however, is the tremendous growth in state and local debt. Yet the debt of state and local governments in the United States has grown much faster than the national debt in the last decade; from 1960 to 1969, the national gross debt rose from $286,331 million[4] to $353,720 million,[5] an increase of 23.5 percent. In the same time period, the total state and local government debt mushroomed from $69,955 million[6] to $133,548 million,[7] an increase of 90.9 percent. Various states experienced different rates of debt growth during the 1960 to 1969 period. Mississippi's state and local governments, however, being located as they are in a state undergoing far-reaching economic and social changes,[8] shared in this growth to an extensive degree. The total debt of Mississippi state and local governments increased from $594 million in 1960[9] to $1,166 million in 1969,[10] a rise of 96.3 percent. There is no indication that the rate of growth will abate in the predictable future.

Mississippi's large state and local debt is a cumulative result of the State's continuously growing financial needs in the post World War II era caused by several basic changes in the State's society and economy. These causal factors are by-products of a differing growth rate (or decline) in population age groups, an increasing rate of industry acquisition, increasing urbanization, a shifting emphasis as to major public goals, and an increased economic well being.

Mississippi has had several fundamental age composition shifts in the last two decades, the most important of which may be the increase in the number of people in the dependent age groups (under 18 and

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[4]Tax Foundation, Inc., Facts and Figures on Government Finance, 1971, at 22 (16th ed. 1971).

[5]*Id.*

[6]*Id.* at 127.

[7]*Id.* at 127.

[8]Many social and economic changes and their impact on the population of Mississippi in the intercensal period from 1960 to 1970 are discussed in Department of Labor Center for Manpower Studies, Mississippi's Population (1960-1970): General Characteristics (1971).

[9]U.S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States, 1962, at 424 (1963).

[10]Tax Foundation, Inc., *supra* note 4, at 128.

over 65) who require the most costly public services.[11] This change has tended to erode the State's tax base and placed an added economic burden on workers in the productive age groups (18 to 65). In the same time period, there has been a trend toward industrialization, so that the manufacturing sector has taken its place alongside agriculture as a mainstay in the State's economy. The value added by manufacturing in Mississippi increased from $642 million in 1958[12] to $1,635 million in 1967,[13] an increase of 154.7 percent. With the rapid industrialization have come the problems of water and air pollution, though the intensities of these problems are probably not as great in Mississippi as in some other states.[14] As the trend toward industrialization grew apace in Mississippi, there was a simultaneous increase in urbanization, since workers moved from farm to city to fill the newly created positions in industry; the State was only 37.7 percent urban in 1960,[15] but it was 44.5 percent urban in 1970.[16] This urbanization trend is important because urban residents have historically demanded that government provide many services which their rural counterparts do without or provide for themselves. Urbanization has helped to contribute to the problems of congestion, inadequate housing, increased crime and other social ills. All the above mentioned changes have been concomitant with the State's and nation's dramatic economic growth and the general increases in the standard of living and personal income level. The changes have increased the demand for more complex schools and equipment and better trained teachers, a more comprehensive public welfare and public health system, better and more expensive roads to accomodate a larger number of vehicles, better law enforcement to cope with the unavoidable problems that arise between persons living in close proximity, more recreational facilities to satisfy a greater leisure inclination, and other publicly supplied goods and services. This tremendous increase in demand, whose growth has tended to outstrip the population and tax base, indicates that the State is not making the transition to an industrialized and urbanized society without financial and other difficulties. Obviously, with the financial tasks which lie ahead growing

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[11] MISSISSIPPI'S POPULATION (1960-1970), *supra* note 8, at 2.

[12] STATISTICAL ABSTRACT OF THE UNITED STATES, 1962, *supra* note 9, at 780.

[13] U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1970, at 699 (1970).

[14] *See generally* Note, *Water Pollution Control in Mississippi,* 41 MISS. L. J. 351 (1971).

[15] STATISTICAL ABSTRACT OF THE UNITED STATES, 1970, *supra* note 13, at 17.

[16] U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, MISSISSIPPI ADVANCE REPORT, PC (V1) -26, 3 (1970).

rapidly, the State must place itself in the soundest possible circumstances as it enters the decade of the 1970's.[17]

The aforementioned changes taking place within Mississippi during the 1960-1969 period required additional expenditures. The revenue requirements discussed above were of such a nature that they were not easily overlooked or deferred; therefore, in the absence of current tax revenue sufficiently large to offset the expenditure, State debt was the alternative.

III. Characteristics of the Mississippi State Debt

Certain characteristics of a state's debt help to identify the financial position of that state; they also help place the state's debt and deficit financing activities in the proper perspective as an integral part of the state's total financial arrangement. As an introduction to the study of Mississippi's debt and deficit financing system in 1969, the State's debt will be discussed in terms of its length of maturity, bond rating and interest rate paid, service requirement, functional distribution, and type of bonds.

A. Length of Maturity

All Southeastern states[18] had a very large part of their total gross debt in long-term bonds [19] in 1969. In 1969, Mississippi's debt amounted to $447,011,000. Of this amount 99.2 percent, or $443,432,000, was in the nature of long-term bonds. The balance of the State's debt (only .8 percent of the total) was in the form of short-term bonds.[20] Only seven of the other ten states in the Southeastern region had any short-term debt outstanding in 1969. North Carolina had 20.6 percent of its debt

[17]The social and economic changes which impinge on the Mississippi state and local debt are not unique to this state. Interesting parallels can be drawn, for example, between Mississippi and Texas. *See* Anderson, *State and Local Debt in Texas: A Profile,* 37 Tex. Bus. Rev., Jan. 1963, at 4-6, for a discussion of the state and local debt situation in Texas. For a discussion of such changes with respect to all state and local government debts combined, see *State and Local Government Debt, Part 1,* Monthly Rev., Federal Reserve Bank of Richmond, June, 1966, at 2-5; and *State and Local Government Debt, Part 2,* Monthly Rev., Federal Reserve Bank of Richmond, Nov., 1966, at 2-5.

[18]States included in the Southeast, for the purposes of this study, are: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Virginia. This group of states will also be referred to as the regional states.

[19]Long-term debt is defined as "debt payable more than 1 year after date of issue." 1969 State Finances, *supra* note 1, at 56.

[20]Short-term debt is "interest-bearing debt payable within 1 year from date of issue, such as bond anticipation notes, bank loans, and tax anticipation notes and warrants." 1969 State Finances, *supra* note 1, at 58.

in short-term form, the laregst percentage for any state in the region. Tennessee was close behind with a 19.4 percent figure. Kentucky was a distant third with a figure of 4.9 percent, followed closely by Arkansas with a figure of 2.3 percent. Mississippi, Alabama, and Louisiana recorded figures of .8, .4, and .4 percent, respectively.[21]

B. Bond Ratings and Interest Rates Paid

From all indications, the bonds of the Mississippi State government are well received in the securities markets. This may be due in part to the favorable credit rating given this government's bonds by Moody's Investors Service, Inc. and other rating services. Almost all of the State's bonds which are rated are given a near-top quality rating in terms of earnings and risk. This rating is based on past debt service record, debt outstanding measured on a per capita or assessed property valuation basis, general financial condition and estimated revenue generating potential, economic outlook, and other factors.[22] All bonds of state and local governments in Mississippi and other states are not rated; for example, Moody's does not rate bonds of any educational institution, issuers with less than a $600,000 total debt, projects under construction when the bonds are floated, issuers without a proven capacity to generate earnings, or the bonds of any government which lacks the necessary financial data for an accurate determination of its ability to service a debt.[23]

Bond ratings are of concern to investors, large financial institutions, and state and local governments. Investors are interested in the quality of the bonds in which they invest their money, for obvious reasons. Ratings are important to commercial banks and other financial institutions, since they are required by law to hold only securities of a certain quality; banks, for example, may hold only those bonds which are rated Baa or above. Also, bonds below a certain rating cannot be used as collateral by borrowers from commercial banks.[24] Ratings are even more important to state and local governments, since the rating they receive determines to a large degree the interest rate which they must pay on their bonds.

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[21]1969 STATE FINANCES, *supra* note 1, at 40. Percentage computations are by the authors from data contained in the above source.

[22]The ratings and the factors upon which the rating is based are found in MOODY'S INVESTORS SERVICE, INC., MOODY'S MUNICIPAL AND GOVERNMENT MANUAL, 1969, at 1495-1502 (1970) [hereinafter cited as MOODY'S MANUAL] and *State and Local Government Debt, Part 2, supra* note 17, at 2-3.

[23]*State and Local Government Debt, Part 2, supra* note 17, at 2-3. The ratings range from Aaa, signifying the least speculative securities, to C, representing the lowest quality bonds. *See* MOODY'S MANUAL, *supra* note 22, at 6.

[24]*State and Local Government Debt, Part 2, supra* note 17, at 2-3.

Mississippi's average interest rate in 1969 was 3.5 percent. This placed it below four of the eleven selected Southeastern states and tied it with one; Alabama led the group with a figure of 4.4 percent and Virginia was last with a figure of 2.6 percent..[25] Mississippi's position reflects favorably on its economic soundness and general credit rating.

C. Functional Distribution of Debt

More bonds outstanding in Mississippi in 1969 had been issued for the purpose of securing funds for maritime facilities than for any other single function.[26] Maritime facilities bonds outstanding in 1969 totaled $157,443,000, or 35.5 percent of Mississippi's total long-term debt of $443,432,000.[27]

In descending order, education and highways vied for second and third places, respectively, in the array of the State debt outstanding by function. Education bonds outstanding in 1969 totaled $105,645,000 and accounted for 23.8 percent of Mississippi's total long-term debt. Local schools and "other education" received $63,700,000, or 14.4 percent of the funds derived from the sale of bonds outstanding, while state institutions of higher education received $41,945,000, or 9.5 percent of the funds.[28]

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[25]The average interest rate for Mississippi in 1969 was computed by dividing the State's total interest paid ($15,427,000) by its total outstanding debt ($447,011,000). 1969 STATE FINANCES, *supra* note 1, at 27, 40. Figures for the other states were computed in the same manner.

[26]Mississippi had three port development or improvement bond issues outstanding in 1969. The largest of the three issues (and chronologically the most recent) was for the purpose of developing a shipbuilding facility for Litton Industries in the Port of Pascagoula. These general obligation bonds (see footnotes 31 and 32 for the definition of general obligation and revenue bonds, respectively) were issued on December 1, 1967 in the amount of $130,000,000 and were outstanding in the same amount on June 30, 1969.

Bonds have been issued for port improvement (as contrasted to port development) in two Mississippi Gulf Coast cities, Pascagoula and Gulfport. Port of Pascagoula bonds are of both the general obligation and revenue bond type. They have been issued in the total amount of $19,000,000; $18,280,000 of these bonds were outstanding on June 30, 1969.

The Gulfport bonds are all of the general obligation type. They have been issued in the aggregate amount of $9,460,000; $9,163,000 of these bonds were outstanding on June 30, 1969.

Data relating to maritime facilities bonds are found in MOODY'S MANUAL, *supra* note 22, at 1500-1501; and [1967-1969] MISS. TREAS. BIENNIAL REPORT, at 69, 72, 74. MISS. CODE ANN. § 7564-20 (Supp. 1971).

[27]1969 STATE FINANCES, *supra* note 1, at 40-41.

[28]*Id.*

Highway bonds outstanding in 1969 amounted to $105,280,000 and accounted for 23.7 percent of the total long-term State debt. Bonds comprising the rest of the debt were issued for the purpose of securing funds to finance "other" functions. The "other" category, which includes bonds issued for police, non-highway transportation, public welfare, housing and community development, and miscellaneous functions, amounted to $75,065,000, or 16.9 percent of the total long-term debt.[29]

The "average" southeastern state had about 50 percent more of its debt in highway and education bonds than did Mississippi. (Mississippi's percentage of debt devoted to higher education was about one-half of that for the "average" Southeastern state, but the two were approximately equal for local and other education.) Mississippi's maritime facilities bonds outstanding as a percentage of total debt were about six times that of the "average" Southeastern state, and the percentage of Mississippi's debt in "other" bonds was slightly higher than for the "average" regional state. The "average" Southeastern state had almost two percent of its debt in hospital bonds and slightly less than that proportion in bonds issued for veterans' bonuses; Mississippi had bonds outstanding in neither area in 1969.[30]

D. Types of Bonds

Because of the demands for public goods and services discussed above, Mississippi, like its counterparts all over the country, has been very much concerned about how much to borrow and how to secure the necessary borrowed funds. Therefore, the question of *what type* of bond to use has frequently been less important than the question of *where* may the funds be borrowed. In keeping with the national trend, the Mississippi State government in the last decade has shifted to a large degree from full faith and credit (general obligation bond) debt[31] to non-guaranteed (revenue bond) debt.[32]

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[29]*Id.* An idea of what comprises other expenditures can be obtained from TAX FOUNDATION, INC., *supra* note 4, at 213.

[30]1969 STATE FINANCES, *supra* note 1, at 40-41. All the percentage computations concerning the functional distribution of debt are by the authors from data contained in the above source.

[31]Full faith and credit debt is "long-term debt for which the credit of the state, implying the power of taxation, is unconditionally pledged." Full faith and credit debt is used interchangeably with general obligation debt in this study. *See* 1969 STATE FINANCES, *supra* note 1, at 53.

[32]Nonguaranteed debt is "long-term debt payable solely from pledged specific sources — e.g., from earnings of revenue producing activities. . .or from specific non-

General obligation bonds are backed by the full faith, credit, and taxing power of the state or local government. The promise to pay is unconditional and incontestible; this provides the investor with a margin of protection greater than he would have with a comparable nonguaranteed bond. Revenue bonds, on the other hand, are theoretically serviced from the revenue producing assets which they are used to purchase, but in reality are often dependent for principal and interest payments from earmarked taxes, certain other pledged charges or rents, or simply a grant from general revenues.[33]

Revenue bonds are used by the State government in Mississippi and other states for several reasons. They provide a means for those governments to circumvent debt barriers which establish ceilings on the amount of debt which can be issued; or, this type issue is used for projects that could not be financed by general obligation debt because of constitutional or statutory restriction. They may also be issued for the sake of political expediencey, since the full faith and credit of the State is not pledged to their service. The revenue bond protects the general taxpayer in case the project fails and in some circumstances, it might even bear a lower interest rate. Also, many people feel that some projects should be self-supporting, or that certain types of projects should be paid for by those who receive benefit from them.[34]

Revenue bonds, however, have several disadvantages. In some states they are issued by public authorities, which are creatures of the legislature, but which may possess a degree of self-determination.[35] This takes the management of the debt further from public control. In case there is a question of whether revenue bond debt is truly exempt from constitutional or statutory limitations, the State may be involved in costly litigation. Another often leveled criticism is that revenue obligations are often used to purchase assets or services which generate no revenue for the State. Also, even though the State is not legally liable for its revenue bond debt, it would probably service such debt in an economic depression in order to protect its fiscal integrity. Considering these disadvantages, it seems logical that the State government should use as much full faith and credit debt as possible, and resort to revenue

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property taxes." Revenue bonds are an important type of nonguaranteed debt; in the literature, these terms are frequently used interchangeably. Nonguaranteed debt is used interchangeably with revenue bond debt in this study. *Id.* at 57.

[33] *State and Local Government Debt, Part 1, supra* note 17, at 3.

[34] MOODY'S MANUAL, *supra* note 22, at a-25.

[35] An authority is "a corporate body created to serve a public purpose and empowered to issue revenue bonds to be serviced and secured by the income of that body." *See* HEINS, *supra* note 2, at 16.

bonds only when necessary. Such a policy would enable the State government to meet current and capital financial needs more effectively.[36] This criticism is not meant to imply, however, that revenue bonds are inappropriate debt instruments in every case; as noted above, they do possess definite advantages under certain circumstances.

Since revenue obligations are not backed by the taxing power of the State, courts have generally held that they are not subject to constitional or statutory limitations.[37] This qualification makes the promise to pay more highly conditional, forcing the investor to seek additional compensation to offset the extra risk of holding a nonguaranteed bond.[38] Therein lines the explanation for the interest rate differential between revenue bonds and general obligation bonds; investors prefer the greater security of guaranteed bonds to the lesser security of revenue obligations, other things being equal, and are therefore willing to accept a smaller interest rate on them.[39] This idea is developed more fully in Section III.

In 1969, State revenue bond debt in Mississippi amounted to $134,046,000; this amount represented 30.2 percent of the total gross long-term debt of $443,432,000.[40] In contrast, in 1969 full faith and credit issues in Mississippi amounted to $309,386,000, or 69.8 percent of the State's gross long-term debt.[41]

Gross long-term state debt outstanding for the eleven Southeastern states totaled $6,401,495,000 in 1969.[42] Full faith and credit bonds accounted for $1,875,197,000, or 29.3 percent of the total; $4,526,298,000, or 70.7 percent of the total, was held in the form of revenue bond debt.[43]

These figures reveal that in 1969 Mississippi's debt was composed of a significantly larger percentage of full faith and credit issues than was true for the eleven Southeastern states, on average; this means that

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[36] *State and Local Government Debt, Part 1, supra* note 17, at 5.

[37] HEINS, *supra* note 2, at 16; Tucson Transit Auth., Inc. v. Nelson, 485 P.2d 816 (Ariz. 1971); Arizona Highway Comm'n. v. Nelson, 459 P.2d 509 (Ariz. 1969); Mims v. McNair, 165 S.E.2d 355 (S.C. 1969).

[38] The large degree of investment risk associated with revenue bonds stems from the fact that if a project does not generate sufficient revenue to pay off the bonds, there is no other legal obligation on the part of the state.

[39] *State and Local Government Debt, Part 1, supra* note 17, at 5.

[40] 1969 STATE FINANCES, *supra* note 1, at 40. All the percentage computations, and the aggregate computations for the eleven Southeastern states combined, in the remainder of this section are by the authors.

[41] *Id.*

[42] *Id.*

[43] *Id.*

Mississippi had a smaller percentage of revenue bond debt than the "average" Southeastern state.

Five states in the regional group – Alabama, Arkansas, Georgia, Kentucky, and Virginia – had less than 25.0 percent of their debts in guaranteed debt.[44] Louisiana and South Carolina had between 45.0 and 60.0 percent of their debt in full faith and credit form in 1969.[45] North Carolina and Tennessee were the only states with more than 75.0 percent of their debt in guaranteed form.[46] Only one state in the region, Florida, had no full faith and credit debt outstanding in 1969.[47]

E. Service Requirements on the Mississippi Debt, 1967-1969

Biennial maturities of revenue bonds amounted to $11,503,000 in Mississippi in 1969, while maturities on full faith and credit bonds amounted to $18,238,000. Total maturity payments amounted to $29,741,000. Interest payments on revenue obligations amounted to $7,193,851.60 in 1969 and interest payments on full faith and credit bonds amounted to $21,244,978.57; total interest payments amounted to $28,438,830.17. Total debt service requirements (maturities plus interest payments) in the 1967-1969 biennium amounted to $58,179,830.17.[48]

F. Reasons for Mississippi's Small Percentage of Nonguaranteed Debt

Mississippi had a smaller percentage of its State debt in revenue bonds than did most of the other Southeastern states in 1969; also, the State had a much smaller percentage than the "average" state in the nation.[49] This situation may be due, at least in part, to the liberal full faith and credit debt limitations in the State.[50] The Mississippi Constitution provides that:

> Neither the State nor any of its direct agencies, excluding the political subdivisions and other local districts, shall incur a bonded indebtedness in excess of one and one half (1½) times

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[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] [1967-1969] MISS. TREAS. BIENNIAL REPORT, at 65-73. Service requirement figures on state debts are not presented on a disaggregative basis by the Department of Commerce; hence the use of figures from the State Treasurer's Report. The two sources disagree on the amount of revenue bonds outstanding. For a more complete explanation, *see* note 60, *infra.*

[49] 1969 STATE FINANCES, *supra* note 1, at 40. Percentage computations are by the authors from data contained in the above source.

[50] HEINS, *supra* note 2, at 29-35, discusses the effectiveness of the different types of constitutional debt restrictions in Mississippi and other states.

> the sum of all the revenue collected by it for all purposes during any one of the preceding four fiscal years, whichever year might be higher.[51]

In 1969, the total State general obligation debt was $309,386,000.[52] The total revenue for the same year was $783,010,000;[53] this was the largest amount of revenue generated during any of the four years of the period 1966-69. Consequently, the maximum constitutionally permissible debt in 1969 was $1,174,515,000 (783,010,000 times 1½). The permissible debt limit, therefore, was over three and one-half times the amount actually outstanding.

It is a credit to the State that its legislative representatives have resisted the temptation to incur debt up to the legal limit, and burden the taxpayers with huge annual debt service payments. On the other hand, the efficacy of issuing revenue bonds, *at higher interest costs*[54] when the State has constitutional authority to issue general obligation debt *at lower interest costs* must be questioned.

IV. Interest Rates Paid By Mississippi on the Two Types of Debt

In view of the fact that a large part of the Mississippi State debt is held in the form of revenue bonds rather than full faith and credit bonds, the question naturally arises as to the relative costs of these two

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[51]Miss. Const. art. 5, § 115 (as amended 1960). This amendment was approved by the electorate on November 9, 1960, and inserted in the State Constitution on November 23, 1969. *See also* Moody's Manual, *supra* note 22, at 1495.

[52]1969 State Finances, *supra* note 1, at 40.

[53]*Id.* at 19.

[54]Previous studies have shown that in most cases revenue bonds earn a higher interest rate than general obligation bonds, other things being equal. Heins, *supra* note 2, at 36-37, has presented the most complete exposition of the interest rate differential between guaranteed and revenue bonds in the several states. *See also,* J. Maxwell, Financing State and Local Governments 204 (1965). Maxwell says that the "interest rate on nonguaranteed bonds has been 0.5-0.6 percent higher than on full faith and credit bonds." Maxwell does not indicate, however, how he arrived at this particular figure. The Council of State Governments found the differential to be between 0.5 and 1.0 percent. *See* The Council of State Governments, Public Authories in the States 72 (1953), cited in Simpson, Oklahoma's State Debt 318 (1959) (unpublished dissertation, Univ. of Oklahoma). Manuel Gottlieb also found that a differential existed between revenue and general obligation bonds. *See* Gottlieb, *The Revenue Bond and Public Debt,* 2 The Quarterly Review of Economics and Business, May 1962, at 38. Concurring with Gottlieb are the following four authors, all of which are cited by him. R. Robinson, Postwar Market For State And Local Government Securities 17, 204 (1960); W. H. Tyler, *Revenue Bond Financing: Advantages and Disadvantages,* 32 Municipal Finance, Aug., 1959, at 76; W. Dowrie and D. Fuller, Investments 391 (2d ed. 1950); and E. Troxel, Economics of Public Utilities 661 (1947).

types of debt to the State. The implications of any interest differential are very important. If a large difference between the interest rate paid on full faith and credit and revenue obligations exists, it follows that excessive interest is being paid on the debt.[55]

Available evidence[56] indicates that the revenue bond earns a higher rate of interest than the general obligation bond when the two have comparable features, although it is difficult to prove that this differential exists, and even more difficult to show how great it is, since it is unusual for a state to issue full faith and credit bonds and revenue obligations of the same amount, type, length of life, etc., at the same time.[57] Upon *a priori* grounds, investors normally prefer a bond with greater security to one with lesser security, other things being equal. Therefore, logically, investors would normally prefer bonds guaranteed by the State's power to levy taxes on its wealth and income to the less secure revenue bonds, which are not backed by the full faith and credit of the State.[58] Several procedures have been designed to empirically demonstrate that a differential exists between the interest rate paid on revenue debt and the rate paid on full faith and credit debt. One such test, developed by Professor A. James Heins, is presented below, and is applied to the Mississippi State debt outstanding in 1969. This technique will be the basis for determining the interest costs the State of Mississippi incurred because of the heavy reliance on revenue bonds for financing debt.[59]

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[55]This topic receives excellent coverage in D. LYNCH, THE DEVELOPMENT OF STATE AND LOCAL DEBT IN KENTUCKY: *1890-1962,* at 71 (1966).

[56]*See supra* note 54, for such evidence.

[57]John L. O'Donnell, *The Tax Cost of Constitutional Debt Limitation in Indiana,* 15 NATIONAL TAX JOURNAL 410 (1962).

[58]Lynch, *supra* note 55, at 71.

[59]Through the use of a statistical technique known as multiple regression analysis, Professor Heins developed a model to determine the variables which control or affect significantly the magnitude of the interest rate which a state pays on its borrowed funds. Through this method, the impact on net interest cost resulting from the use of a certain type bond can be determined. Several variables are considered, and those which do not have a significant effect on the interest rate can be rejected from the analysis. The multiple regression model will be applied to the Mississippi debt at a later point in this paper to determine the magnitude of the extra interest burden that Mississippi bears due to revenue bond borrowing. To avoid confusing the uninitated reader with technical terms and discussion which may not interest him, certain technical material relevant to this discussion has been placed in an appendix to this paper.

Heins described the technique he used in his *Constitutional Restrictions Against State Debt, supra* note 2, at 36-38. Only one refinement was made to Heins' model in this paper. This change is discussed in footnote 6 of the appendix. Other authors

The Magnitude of Interest Costs

Application of equation (4), developed in the appendix of this paper, to the revenue bonds outstanding in Mississippi in 1969 will produce a reliable estimate of the additional interest the State will be paying throughout the life of those bonds relative to the interest required on bonds of the full faith and credit type. The sizes of various bond issues and the interest rate differential computations are shown in Table 1; an evaluation of the excess interest costs because of reliance on revenue bonds will be made from that data.

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have used Heins' basic model. *See, e.g.,* R. PORTER, FACTORS INFLUENCING THE COST OF STATE AND LOCAL BORROWING IN KENTUCKY 45-87 (1965).

The equation specified for the multiple regression model developed by Heins indicates that the interest cost of a state's nonguaranteed bonds (1r) is determined by the credit rating of the state (R), amount of issue (A), purpose of issue (P), call provisions (C), maturity of issue (M), general level of the interest rate (L), type of issuer (T), security for the issue (S), and types of bid (B). These variables were selected because of their availability, appropriateness, and because of their historical acceptance by economists as determinants of the interest rate. These determinants of the interest rate became the independent variables in an initial multiple regression equation in which the dependent variable was the nonguaranteed bond interest rate. The relationship between the dependent and independent variable can be shown symbolically in the following equation:

$$1r = f\ (R, A, P, S, C, B, M, L, T). \qquad (1)$$

This functional relationship says that the interest rate on nonguaranteed bonds (1r) is affected by the nine variables (R, A, P, S, C, B, M, L, T); these variables have been defined in the above discussion.

The equation specified for the guaranteed bonds was quite similar to the one for nonguaranteed bonds; in the case of guaranteed bonds, variables for type of issuer (T), security of the issue (S), and type of bid (B), were eliminated from the final equation for determining interest cost for guaranteed bonds. The type of issuer (T) was not included as a determinant in the full faith and credit equation because all such debt is backed by the state. Type of issue was considered in the equation for nonguaranteed bonds because the confidence of investors in the different type authorities may be reflected in the price they are willing to pay for nonguaranteed bonds. Inasmuch as the security of the state's revenue stands behind full faith and credit bonds, (1g) was not considered to be a function of the security offered to stockholders (S). Because almost every issue of full faith and credit bonds is offered at competitive bid, (1g) was not considered to be a function of the type of bid (B).

For full faith and credit bonds, the relationship between the independent and dependent variables is indicated by the following equation:

$$1g = f\ (R, A, P, C, M, L). \qquad (2)$$

This functional relationship says that the interest rate on guaranteed bonds (1g) is affected by the six variables (R, A, P, C, M, L); these variables have been previously defined. *See* HEINS, *supra* note 2, at 60-68, and Heins, *The Interest Rate Differential Between Revenue Bonds and General Obligations: A Regression Model,* 15 NATIONAL TAX JOURNAL, 399-405 (1962).

Table I
Estimated Additional Interest Costs From Revenue Bond Financing in Mississippi in 1969

Purpose for which Funds Used	Date of Issue	Bond Rating	Average Interest Rate on all Government Bonds[a] (Percent)	Amount Issued (Thousands)	Interest Cost of Similar General Obligation Bonds (Percent)	Average Interest Cost on Revenue Bonds[b] (Percent)	Added Annual Interest Payments	Added Payment Over Life of Issue
1	2	3	4	5	6	7	8	9
Port of Pascagoula	9-1-59	Aa	4.26	1,000	3.53606	4.0957	$ 5,596.406	$ 139,910.100
Highways	8-1-58	A	3.60	4,000	2.99817	3.5523	20,964.990	387,852.300
Highways	2-1-59	A	3.92	1,000	3.23692	3.7793	5,423.801	108,476.000
Highways	2-1-59	A	3.92	5,000	3.23692	3.8964	32,974.050	659,481.000
Highways	8-1-59	A	4.10	5,000	3.35327	3.9988	32,276.280	629,387.500
Highways	8-1-62	A	3.97	2,000	3.26442	3.3545	1,801.624	35,131.670
Highways	2-1-63	A	3.92	5,000	3.22357	3.0061	−10,873.460	−206,595.700
Highways	8-1-63	A	3.99	5,000	3.26474	3.2273	−1,871.966	−34,631.370
Highways	2-1-64	A	4.14	5,000	3.38729	3.3661	−1,059.485	−21,189.690
Highways	2-1-64	A	4.14	2,000	3.48019	3.2973	−3,657.780	−73,155.560
Highways	8-1-64	A	4.14	3,000	3.38729	3.3517	−1,067.705	−21,354.090
Highways	2-1-65	A	4.16	6,000	3.40096	3.3187	−4,935.551	−98,711.000
Highways	8-1-65	A	4.19	5,000	3.42146	3.4439	1,121.807	22,436.140
Highways	8-1-66	A	4.80	2,000	3.83840	4.6223	15,678.000	313,560.000
Highways	8-1-66	A	4.80	4,000	3.83840	4.6225	31,364.020	627,280.400
Highways	8-1-66	A	4.80	1,000	3.93130	4.5274	5,961.008	119,220.100
Highways	2-1-67	A	4.47	10,500	3.61284	4.1939	61,010.820	1,220,216.000
Highways	2-1-68	A	5.16	7,500	4.08446	5.0200	70,165.560	1,403,311.000
Highways	8-1-68	A	5.04	5,000	4.00244	4.4348	21,618.020	432,360.400
				79,000,000				
						Total	282,490.000	5,642,980.000

State of Mississippi, [1967-1969] REPORT OF THE STATE TREASURER 74-78; MOODY'S MANUAL, *supra* note 22, at 1495-1502. Various issues of Board of Governors of the Federal Reserve System, *Federal Reserve Bulletin;* and private correspondence with Miss Evelyn Gandy, State Treasurer of Mississippi.

[a]The average interest rate on all government bonds is taken to be the interest rate borne by long-term taxable U.S. government securities.

[b]The average interest cost of revenue bonds was provided by Miss Evelyn Gandy, State Treasurer of Mississippi.

The information presented in Table 1 is necessary to evaluate the extra interest paid by Mississippi because of heavy reliance on revenue bonds as a source of financing. While the table is rather straightforward, some explanation is required. All of the data required for a comparison of this type is not published; therefore, it was necessary to obtain additional information from the State Treasurer.

The Treasurer was only able to provide information for $79,000,000, or 56.66 percent of the total revenue bond debt outstanding of $139,429,000 in 1969.[60] A breakdown of the $79,000,000 of debt is presented in Table 1. The following discussion reveals how the partial figures "expanded" to reflect the total effect of the total debt.

Table 1, Column 8, shows that the average additional annual payments that the State of Mississippi will be required to pay on its revenue bond debt outstanding (for which information is available) amounted to $282,490 in 1969. This computation was made by computer by taking the differential interest rate between Column 6 and Column 7 and multiplying that amount by the amount of the bond issue. Restated, this computation reveals that on the basis of available 1969 data Mississippi paid $282,490 more in interest charges in that year than the State would have had to pay if full faith and credit bonds would have been issued instead of revenue bonds. This computation, however, clearly underestimates the true magnitude of that difference. Since the available data in Column 5 contained only 56.66 percent of the outstanding State revenue bond debt, approximately 43 percent of the debt is excluded. All attempts to obtain the balance of the data necessary to compute the difference in interest rates for all bonds outstanding were unsuccessful; therefore, it was decided that a satisfactory estimate could be made by expanding the calculated difference to the level it would reach if one logical assumption were true. That assumption is that the interest rate on the remaining $60,429,000 not included in Column 5 incurred interest costs at the same rate as the $79,000,000 for which

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[60]The nonguaranteed debt figure presented here is not strictly comparable to the nonguaranteed figure presented earlier when comparisons were being drawn between Mississippi and the other Southeastern states. The figure used previously was taken from 1969 STATE FINANCES, *supra* note 1, at 40-41. The Bureau of the Census presents figures on a uniform basis for all fifty states, thus facilitating interstate comparisons of certain variables. The figure used here is taken from State of Mississippi, [1967-1969] MISS. TREAS. BIENNIAL REPORT at 72-78. The State Treasurer's data was selected at this juncture because only this source has the needed detailed information to "plug" into the multiple regression equations. In 1969, the Department of Commerce reported a revenue bonded indebtedness of $134,046,000; the State Treasurer reported a figure of $139,429,000.

data were available. When the necessary computations were completed the extra interest incurred is even more impressive than the $282,490 mentioned above. The total of Column 5 was increased to a level equal to 100 percent of the State debt outstanding in 1969 ($139,429,000); therefore, $60,429,000 was added. If the remaining $60,429,000 of the State's revenue bond debt had earned interest at the same rate, the average annual additional interest paid on the aggregate revenue bond debt would amount to *$498,570.*

Table 1 also shows that the additional interest payments over the entire life of the revenue bonds (for which information is available) outstanding in 1969 amounted to $5,642,980. Under the same assumption that the remaining $60,429,000 earned interest at the same rate as the $79,000,000 for which information is available, then the estimated total extra interest paid over the life of the issues amount to $9,959,372.

The above discussion dramatically illustrates the fact that revenue obligations carry higher interest rates than bonds for which the credit of the State is pledged, resulting in an increased debt burden on Mississippi. The next section of the paper discusses the importance of this finding for public policy purposes.

V. Conclusions and Public Policy Recommendations

From the foregoing it has been demonstrated that constitutional limitations in Mississippi do not impose ceilings on full faith and credit issues which are so low that they cause authorities to rely on revenue bonds for financing. This conclusion emerges from the fact that the outstanding full faith and credit debt in Mississippi in 1969 was substantially *under* the statutory ceiling. These results indicate that even though the ceiling is not approached, a substantial amount of Mississippi debt is in the form of revenue bonds.

Since revenue bonds were shown to bear a higher interest rate than full faith and credit issues, Mississippi is incurring higher interest costs because of its relying on nonguaranteed instruments. Since the debt ceiling apparently is not the critical factor causing the higher costs to be incurred, one can only assume that those in a position to affect decisions in such matters have reasons for relying on revenue bonds instead of full faith and credit issues. One important purpose of this paper was to discover whether the laws, as written, caused higher interest costs; if the law did impose debt ceilings which caused the use of revenue bonds (at a higher interest rate) instead of full faith and credit bonds (at a lower rate), the policy recommendation would have

been that the legislature seriously consider raising or eliminating those ceilings to permit more reliance on full faith and credit issues to lower the interest costs to the State. Since the Constitution is not the culprit, the law need not be changed to effect significant economy in managing the State debt. Therefore, it is recommended that those who make decisions concerning what type of security to issue seriously consider the disadvantages of the higher interest costs of revenue bonds when they are inclined to use that type of security. To the extent that full faith and credit issues could be used instead, *substantial interest costs could be eliminated.* Such savings could release tax monies, used to pay the higher interest costs, for more worthy purposes such as health, education, and economic development.

Even if one takes the estimated savings mentioned above and divides the number by 2, reflecting only a 50 percent hypothetical diversion of revenue bond debt to full faith and credit debt, the savings are still substantial. Such an arbitrary adjustment would reduce the estimated annual savings mentioned above from $498,570 to $249,285 and the estimated savings over the life of the outstanding issues to almost 5 million dollars. If the amount of debt outstanding in Mississippi continues to increase, the magnitude of future savings would be even more impressive.

The above discussion does not intend to argue that 50 percent of the revenue bonds issued by the State should or could be full faith and credit issues. Instead, the results indicate that Mississippi is paying a higher interest cost whenever it uses a revenue bond when a full faith and credit issue would have been feasible. It appears reasonable, therefore, to suggest that the fiscal authorities in Mississippi reassess the bases on which they elect to use revenue bonds instead of full faith and credit issues. Perhaps even a greater diversion than the example given above would be possible.

APPENDIX

The text of the paper presents the essentials of the analysis of this study revealing the adverse cost impact whenever Mississippi uses revenue bonds wherever full faith and credit issues are feasible. Certain technical procedures were required to generate the data necessary to make the analysis; however, it was thought that some of the procedures may confuse the reader, or detract from the essential points of the paper. For this reason, technical explorations were avoided in the discussion within the text. However, since some readers may be interested in these technical aspects, the decision was made to include such information, but to present it in this appendix.

ESTIMATED REGRESSION EQUATIONS

To approach the analysis, the comparable full faith and credit bond interest rate must be estimated by a technique that allows any existing differential between types of bonds to be attributed to the nature of the revenue or full faith and credit bond rather than to the particular or unique features of a specific type bond. Influences of variables such as type of issuer, credit rating of issuer, amount of issue, purpose of issue, security of issue, etc., must be isolated. With the successful isolation of these factors, and given knowledge of the revenue bond interest rate, an estimate can be made of the interest cost which would have been required for a comparable full faith and credit bond.[1] The method employed to estimate the relative impact of each of these variables was multiple regression analysis.[2]

The final estimated regression equations are as follows:

$$I_G = .2472 + .1363\ X_{r_1} + .3613\ X_{r_2} - .0929\ X_c + .0267\ X_m + .6835\ X_L . \quad (1)$$

$$I_r = .3038 + .2833\ X_{r_1} + .4237\ X_{r_2} + .6215\ X_{r_3} + .2709\ X_{p_1} + .3354\ X_{p_3} + .1263\ X_{s_2} + .0284\ X_m + .7272\ X_L . \quad (2)$$

where:

1. X_r is Moody's Investors Service, Incorporated rating of the issue. This is an estimate of the financial capability of the issuer, discussed in Section II of this study. For general obli-

[1]These are the same variables used in a similar study by A. James Heins. *See* Heins, *The Interest Rate Differential Between Revenue Bonds and General Obligations: A Regression Model,* 15 NATIONAL TAX JOURNAL 403 (1962). Hein's study included data from several states.

[2]As mentioned in the text of this paper, the approach used in this study, in the essentials, parallels that employed by Heins. *Id.*

gation bonds, Aaa rated bonds are represented by X_{r_0}, Aa by X_{r_1}, and A by X_{r_2}; for revenue obligations, Aaa or Aa rated bonds are represented by X_{r_0}, A by X_{r_1}, Baa by X_{r_2}, and unrated bonds by X_{r_3};[3]

2. X_c is the call feature; 1 represents a callable bond, and 0 represents a noncallable bond;
3. X_m is the average maturity of the issue in years;
4. X_L is the index of the long-term bond interest rate: the Federal Reserve index of long-term government bond yields at the date of issue is the interest rate used;
5. X_p represents the purpose of issue: for general obligation bonds, X_{p_0} represents all purpose other than roads, utilities, and educational facilities, X_{p_1} represents roads, X_{p_2} represents utilities, and X_{p_3} educational facilities; for revenue bonds, X_{p_0} represents all purposes other than toll roads and bridges, nontoll roads and bridges, utilities, and education facilities; X_{p_1} represents toll roads, X_{p_2} represents nontoll roads, X_{p_3} represents utilities, and X_{p_4} represents educational facilities;
6. X_{s_2} represents the security for the issue when state rental revenues are used for that purpose.[4]

Significance of Variables

Several variables postulated to be important determinants of the interest rate in the original study proved to have no significant effect and hence were eliminated for the purposes of that study.[5] Among the variables rejected were the amount of issue and purposes of issue of full faith and credit bonds. Variables wielding no significant effect on the revenue debt interest rate were purpose of issue, other than for toll roads and utilities, legal status of issue (state or authority), call provisions and type of bid (negotiated or competitive). These variables were also excluded from this analysis.

The estimated multiple regression equation indicating the determinants of the revenue bond interest rate, (1) above, does not have a

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[3]The assumption is made that general obligation bonds, since they are backed by the full faith and credit of the State, generally have a credit rating one notch above revenue bonds which have similar covenants and are issued under comparable economic conditions. This method of rating is justified on the basis that general obligations ratings have tended to be one notch higher than revenue bonds where states have issued both types of obligations. This procedure is consistent with that used by HEINS CONSTITUTIONAL RESTRICTIONS AGAINST STATE DEBT 51 (1963).

[4]*Id.* at 61. In the derivation of equations (1) and (2), the dummy variable approach was used to implement the following variables, which do not lend themselves to numerical measurement: T, R, P, S, C, and B. The same approach was used to determine the explanatory power of A, the amount of the issue, so that the bias of extreme observations on the regression would be avoided.

[5]*Id.* at 63-67.

direct bearing on the problem at hand, and will be ignored. This equation could be used to yield the comparable revenue bond interest rate for a given full faith and credit bond interest rate; however, in the case of Mississippi debt, the objective was to estimate the potential comparable full faith and credit bond interest rate for a given nonguaranteed bond. To obtain a comparative interest rate for this study, relevant information concerning full faith and credit issues outstanding was "plugged into" equation (2) (the equation to determine the interest rate on full faith and credit issues). The results of the computation by computer yields the interest rate on these full faith and credit issues. This manipulation generates the data for Column 6. These figures in Column 6 were subtracted from those in Column 7 to obtain the differential rate. When the differential interest rate is applied to the amount of a given bond issue the result reflects the cost difference between revenue bonds and full faith and credit issues; this data is presented in Column 8.[6]

Column 9, Table 1, is a projection of the annual interest differential over the life of the bond issue.[7]

Linear equations were used in this study to estimate the interest rate differential for two reasons: (1) Heins found such equations suitable for his study, which is highly regarded in the field of public finance, and (2) this study did not attempt to refine Heins' model; it was accepted as being a satisfactory technique for estimating interest cost differences without modification.

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[6]In several of the issues in Table 1, the estimated general obligation interest rate is greater than the interest cost of the revenue bonds with which they are compared. Two alternatives exist as to how to handle this situation. First, the assumption could be made that the negative difference is due to the nature of statistical estimation, and that such differences should not be considered in determining net interest savings since the State could have guaranteed the bonds and not paid the higher rate. Second, the assumption could be made that in certain instances revenue bonds might bear a lower interest rate than general obligation bonds, and that such negative interest differentials should be considered when computing the State's potential net interest savings. In this study, the authors chose the latter alternative as the best method of determining the possible savings which would accrue to the State if it were to use general obligation rather than revenue bonds. The latter alternative tends to bias the potential interest savings toward the conservative side. Heins chose the former alternative in his model. *Id.* at 51. This is the only point in the study where the authors did not adhere to Heins' model.

[7]It is possible that if the State were to move into general obligation bonds entirely that the general obligation interest rate would rise. There is no way of determining the precise magnitude of the increase, since it would depend on many imponderables, such as the willingness of revenue bond investors to accept lower rates, how many investors would switch to other types of securities, etc. Heins did not consider this a significant factor in his analysis. *Id.* at 55.

STUDENT COMMENTS

THE UNIFORM CONTROLLED SUBSTANCES ACT OF 1971: AN ADEQUATE ANSWER TO MISSISSIPPI'S DRUG ABUSE PROBLEM?

I. Introduction: An Awareness of the Problem

On April 16, 1971, during the closing hours of the session, the Mississippi legislature adopted the Uniform Controlled Substances Act[1] to replace the Uniform Narcotic Drug Act of 1962[2] and the Barbituric Acid and Stimulant Control Act of 1962.[3] This new law is obviously a realization by the legislature that the problem of drug abuse is a dilemma that Mississippi must now attempt to combat and solve. We can no longer consider the problem to be foreign to our state.

Kenneth Fairley, Director of the Mississippi Bureau of Drug Enforcement has said that "Mississippi is on the verge of being overwhelmed with a narcotic and drug problem,"[4] and the figures show that this statement may be correct. Every county in Mississippi has asked for state aid in fighting drug abuse. In the past few years Mississippi health authorities have discovered the first known heroin addicts among our state's citizens. In Hinds County from 1964 to 1968 there were 27 persons arrested by the Jackson Police Department for narcotic and drug law violations of narcotic and drug laws. The Division of Law Enforcement Assistance, Office of the Governor, found that in 1971, 686 persons were arrested for violations of the narcotic and drug laws. The statistics compiled by the Law Enforcement Assistance Division came from Biloxi, Cleveland, Columbus, Greenville, Greenwood, Gulfport, Hattiesburg, Jackson, Meridian, Pascagoula, Starkville, Vicksburg, and West Point; and all but three of the above cities revealed over a 200 percent increase in narcotics arrests.[5] To illustrate the amount of illegal drugs in Mississippi, it can be noted that between October 1, 1971, and January 31, 1972, the Drug Enforcement Bureau seized or purchased over a quarter of a million dollars worth of illicit drugs.[6]

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[1] Miss. Code Ann. §§ 6831-51 *et seq.* (Supp. 1971).

[2] Act of Mar. 1, 1962, ch. 397 [1962] Gen. Laws Miss. 692 (repealed 1971).

[3] Act of Mar. 1, 1962, ch. 396 [1962] Gen. Laws Miss. 686 (repealed 1971).

[4] Interview with Kenneth W. Fairley, Director of the Mississippi Bureau of Drug Enforcement, February 4, 1972.

[5] *Id.*

[6] K. Fairly, Report to the Mississippi Committee on Public Health, January 31, 1972.

Once the fact of drug abuse in Mississippi is established and accepted as a major problem, the inquiry should be whether or not the Uniform Controlled Substances Act adopted in Mississippi is a sufficient weapon with which to combat this challenge to today's society. This comment is an attempt to make such an inquiry. Its purpose is to provide the practitioner with a general background into the drug abuse problem by a discussion of several major areas: a history of governmental efforts in this field, an analysis of the major points of Mississippi's drug abuse law, judicial construction of such laws, the debate over the proper classification of the controlled substances, and a look at the penal provision of the new law.

More importantly, however, the authors hope that this comment will give its readers some factual basis upon which to both appreciate the need for action and form an opinion concerning this uncharted and often ill-defined area of the law. Viewpoints often differ about the approach to solving the problem. One opinion may be critical of the way in which the law has handled drug abuse:

> It has become increasingly apparent that the law has failed to offer a constructive means of dealing with the many problems of drug abuse. Rather, the law seems only to have succeeded in alienating thousands of young people and in making a mockery out of an entire segment of our system of criminal justice. Arbitrary enforcement of harsh and often senseless legislation has resulted in the branding of thousands of young people as felons, while a critical void continues to exist in the field of education and in other preventive measures.[7]

Or another opinion may state that the law should adopt and keep a strong stand against the abuse of narcotics:

> We may or may not agree that mere drug abuse is bad *per se*. But, when the habitual use of certain drugs happens to be detrimental to the well-being of both the individual and society, it must be regarded as a pernicious vice and proscribed by law. . . . [It] would be highly undesirable for society to adopt a permissive attitude toward a deleterious practice.[8]

Even though a disparity of feelings exists in choosing the best manner in which to assault the drug abuse dilemma, the goal of finding an effective method of dealing with this multi-faceted problem must nevertheless be reached. Until a better answer is found, whatever approach a state adopts must be used as best it can and supported by all concerned, realizing, of course, that the law must keep pace with and adapt to the changing needs of society and the rapidly expanding research and knowledge in the area.

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[7]Chayet, *Legal Aspects of Drug Abuse*, 3 SUFFOLK U. L. REV. 1 (1968).

[8]Miller, *Marijuana: The Law and Its Enforcement*, 3 SUFFOLK U. L. REV. 81-82 (1968).

II. The Historical Development of Governmental Efforts to Control Drug Abuse

Prior to the advent of the twentieth century there existed in the United States few if any legally imposed regulations or restrictions upon the possession, sale, or use of what today are considered dangerous drugs and narcotics. Indeed, one needed no prescription to purchase any type of drug, including the opiates. Narcotics were widely used and accepted by all classes of society without the attachment of moral stigma or legal consequence.[9] Measured per capita during the period encompassing the years 1865 to 1900, addiction to narcotics within the United States was approximately eight times greater than it is today.[10]

A. Early Mississippi Legislation

1. The regulation and control of narcotics

Mississippi's initial legislative effort to regulate and control the trafficking and use of drugs occurred in 1886. Legislation which prescribed the manner of selling preparations containing morphine,[11] was approved on March 18, 1886. The statute did not go so far as to limit the authority of a druggist to dispense preparations of morphine without the presentation of a prescription issued by a physician, however. It provided only that the dispensing of a drug preparation containing morphine was unlawful ". . . unless same [should] be wrapped in a scarlet paper or envelope, and all bottles or vials [containing a morphine preparation] . . . have . . . a *scarlet* label, lettered in white letters, plainly naming the contents of said bottle."[12]

Violation of the provisions of this act was deemed a misdemeanor, and upon conviction the offender was susceptible to a fine of not less than ten dollars nor more than fifty dollars at the discretion of the court for each separate and distinct violation. The act made no provision for imprisonment.

Although the legislation was less than comprehensive, an act to regulate any medicinal preparation two decades prior to the turn of the century was progressive legislation. Prior to 1897 no significant legislation in any state had yet been enacted to regulate the manuafcture or distribution of narcotics.[13]

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[9]T. Duster, The Legislation of Morality 3 (1970).

[10]*Id.* at 8.

[11]Act of Mar. 18, 1886, ch. 29 [1886] Gen. Laws Miss. 87.

[12]*Id.*

[13]T. Duster, *supra* note 9, at 12. *See also* M. Nyswander, The Drug Addict as a Patient 1-13 (1956).

On February 5, 1900, Mississippi broadened its classification of regulated substances to include cocaine by enacting legislation to regulate its distribution by sale or gift.[14] Although the derivatives of cocaine were not regulated by the enactment, the legislation did provide the potential for greater control and supervision of cocaine than was afforded morphine preparations by the act of 1886. The cocaine act prohibited the dispensing by either sale or gift of any quantity of cocaine, unless the drug was to be dispensed directly to a lawfully licensed physician or dentist or upon the prescription of such physician. Although prescriptions could be legitimately filled only once, the act stated specifically that it should not be construed to interfere with the medicinal use of cocaine by physicians or dentists in their practice.

Upon conviction for violation of the act, a penalty consisting of a fine to be not less than ten dollars nor more than five hundred dollars, a term of imprisonment in the county jail for not less than one month nor more than six months, or both.

The penalties set out in both early Mississippi acts seem unusually lenient and without probable deterrent effect compared to the standard prescribed by deterrent penalties imposed upon acts of unauthorized possession or sale of either of the regulated substances in later statutes.[15] But knowledge of the patterns of potential addiction to various drugs was only beginning to develop. In 1898 a derivative of morphine known as heroin had been enthusiastically received by the national medical community as a major advancement in analgesic research.[16] At that date only a small segment of the medical profession recognized that the unregulated dispensing of narcotics for treating a myriad of medical problems possessed potentially harmful consequences.[17] This segment of the medical profession proved instrumental, however, in procuring recognition of the potential problems and intervention through regulation by the governments of the several states.

By 1910 the Mississippi legislature had seemingly been made aware of the likelihood of cocaine abuse. During the 1910 legislative session the penal imprisonment of the prior cocaine legislation was sharply in-

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[14]Act of Feb. 5, 1900, ch. 107 [1900] GEN. LAWS MISS. 145.

[15]The penalty for simple possession of morphine in its derivatives under the Uniform Narcotic Drug Act, the statute in force prior to the adoption of the Uniform Controlled Substances Act was not less than two nor more than five years' imprisonment, or a two thousand dollar fine, or both. For cocaine derivatives the penalties were equally harsh. Act of Mar. 1, 1962, ch. 397, § 5 [1962] GEN. LAWS MISS. 695 (repealed 1971).

[16]*See* M. NYSWANDER, *supra* note 13, at 1-13.

[17]*Id.*

creased from maximum confinement in the county jail for not more than six months to minimum confinement in the state penetentiary for not less than one year. The maximum period of confinement for unlawful delivery of cocaine was increased to ten years.[18]

The Mississippi legislature moved again during the 1914 session, enacting legislation which made more difficult the unlawful trafficking in cocaine by providing that "there [was] no property in any cocaine kept or offered for sale in violation of the law, or in any of the vessels or appliances used in connection there-with."[19] The act further provided what might be considered the first penalty for mere possession. The fact that any person not authorized by law to sell or purchase cocaine was found to have the drug or appliances adapted to its sale in his possession was made presumptive evidence that he in whose possession the cocaine or appliances were found was engaged in keeping them for the purpose of sale.[20] Thus the burden of proving an unlawful transfer of cocaine, which had been placed upon the state's prosecutors, was negated. The legislation placed the burden instead upon the accused to rebut the presumption that he was keeping the cocaine for sale. Failure to adequately rebut the presumption, regardless of the actual circumstances surrounding possession by the accused, left him confronted by fine, imprisonment, or both penalties.

In 1924 the classification of regulated drugs was expanded to include not only cocaine but also "opium, morphine or their derivatives or compounds in any quantity whatever."[21] The act continued to limit to regularly licensed physicians, dentists or persons holding prescriptions from such physicians the sale or gift of the listed drugs. The limitation placed upon refilling once-filled prescriptions also remained, as did the expression that the act should not be construed to interfere with the use of the regulated substances by physicans or dentists in their practice.

Although the legislation regulated certain heretofore unregulated dangerous narcotics by making a prescription necessary to obtain them, it did not completely preclude the dispensation of preparations containing narcotic substances. The provisions of the act were "not [to] be construed to apply to the sale, distribution, giving away, dispensing or possession of preparations and remedies which [did] not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one

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[18]Act of Mar. 21, 1910, ch. 186 [1910] GEN. LAWS MISS. 194 (Amended 1924).

[19]Act of Mar. 14, 1914, ch. 144 [1914] GEN. LAWS MISS. 186.

[20]*Id.*

[21]Act of Apr. 10, 1924, ch. 248 [1924] GEN. LAWS MISS. 347.

grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semi-solid preparation, in one avoirdupoise ounce."[22] The legislation made the provision, however, with reference to these exceptions that "such remedies and preparations [had to be] sold, distributed, given away, dispensed or possessed as medicines and not for the purpose of evading the intentions and provisions of this act."[23]

The penalties imposed upon persons convicted of violating the provisions of the 1924 act were carried forward from the act of 1910, which had increased the term of confinement from a discretionary period of one to six months to a minimum confinement of one year and a maximum confinement not to exceed ten years. The legislation in itself did not provide for monetary sanctions.

Clearly Mississippi was late in enacting legislation to control the use and abuse of many dangerous narcotics, although it had taken extremely limited regulatory action concerning morphine quite early. Between 1887 and 1908 almost all states enacted statutes aimed primarily at curbing in some manner the distribution of narcotics.[24] In 1904 the New York legislature enacted the first comprehensive act relating to the problem of narcotics abuse.[25] However, the lack of uniformity of the statutory regulations promulgated by the states soon precipitated intervention by the federal government. Congress enacted comprehensive national legislation in the form of the Harrison Anti-Narcotic Act on December 17, 1914.[26]

Although no conclusive premise exists to explain Mississippi's late entry into the field of control and regulation of narcotics abuse, the fact that the state and its people during the early decades of this century were basically agrarian and to a large extent self reliant, coupled with the general lack of societal anxiety concerning the dangers of abuse and addiction produced by broadscale narcotics use, compels the conclusion that neither narcotics use or addiction was a significant problem of the day in Mississippi.[27]

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[22] *Id.*

[23] *Id.*

[24] T. DUSTER, *supra* note 9, at 13.

[25] *Id.*

[26] Act of Dec. 17, 1914, ch. 1, 38 Stat 785. (found in scattered sections of 26 U. S. C.).

[27] Prior to 1971 Mississippi state health officials had reported treating heroin addicts at the facilities in Jackson, Mississippi. During 1971 fifteen cases of heroin addiction were reported and treated. Interview with Kenneth W. Fairley, Director of the Mississippi Bureau of Drug Enforcement, February 4, 1972.

2. *The Regulation and Control of Marijuana*

Indian hemp, widely cultivated commercially as one of the earliest crops in the American Colonies,[28] had been manufactured into rope, twine and textiles throughout the United States for one hundred and fifty years before use in its more exotic form, marijuana, was proscribed by legislation in Mississippi. In 1930 the legislation made it unlawful "for any person or corporation to sell, barter, give away, or keep for sale in this State, cigarettes, cigars, or tobacco . . . in which there [was] a mixture or compound of the drug Cannabis Indica, commonly known as Mari Juana."[29]

The prohibition which the statute placed upon the transfer of cannabis indica was absolute. Unlike the prior narcotics regulations, there was no provision in the act which authorized dispensing to or upon the order of a health professional. Persuasive authority indicates that the apparent disparity was justified upon the basis that marijuana failed to possess known theraputic qualities,[30] while concurrently the fact that it is not addicting was not readily appreciated by the medical or legal community.[31] In fact, during the same period "the Federal Bureau of Narcotics was condemning the use for pleasurable purposes of the dried crumpled stems, leaves and seed pods of Indian hemp,"[32] through very intense views expressed by the Commissioner of the Bureau.[33] No doubt the influence of Bureau rhetoric went throughout all states and was expressed in state legislation.

Those persons violating the act were deemed guilty of a misdemeanor, and upon conviction they were subject to penalties including a fine not exceeding one hundred dollars, imprisonment in the county jail not exceeding sixty days, or both fine and imprisonment. The imposition of the penal sanctions were placed within the sound discretion of the trial court.

Although Chapter 13 of the Laws of 1930 had made unlawful the *sale, bartering, gift or keeping for sale* of commodities intended for smoking in which there was contained a mixture or compound of the drug

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[28]Hoff, *Drug Abuse,* 51 MIL. L. REV. 181 (1971).

[29]Act of Feb. 27, 1930, ch. 13, § 1 [1930] GEN. LAWS MISS. 13.

[30]Hoff, *supra* note 28, at 181.

[31]*Id.* at 183.

[32]*Id.*

[33]*Id.* at 184. According to the view expressed by the Commissioner: "It undermines its victims and degrades them mentally, morally, and physically. There is complete unpredictability with effects that may range from intense intoxication, having fits, criminal assaults, and stupefaction." *Id.*

commonly known as marijuana, the legislation provided no overt penal sanction for simple possession.[34] In 1934, however, legislation repealing the 1930 statute[35] and clearly manifesting a criminal sanction for simple possession was enacted. At the same time the new act licensed lawful possession by certain designated classses of individuals and professions on a basis quite similar to the narcotic control legislation of the previous two decades. The statute made unlawful the possession of marijuana by one "other than a regularly licensed druggist or apothecary"[36] except possession gained through the transfer by druggists to regularly licensed physicians or upon prescription of such physicians. In no instance was the prescription to be refilled by the druggist. Possession by one not authorized by the act to purchase, sell, or keep for sale any mixture or compound containing cannabis indica was legislatively determined to be presumptive evidence that that individual was keeping the marijuana for the purpose of sale.

Violators were held to be guilty of a misdemeanor, which was punishable upon conviction by fine and internment in the county jail. The fine could be no less than fifty dollars nor no more than five hundred dollars, and the period of imprisonment could vary from one to six months.

The two fundamental changes from the 1930 act evidenced in the 1934 act, that of making unauthorized possession unlawful and that authorizing limited possession and dispensation by the pharmaco-medical community, appear to be antagonistic to one another. While the absolute limitation against unauthorized possession supports the theory submitted as a possible basis of the 1930 enactment, the grant of authority to physicians to prescribe marijuana obviously presumed that the drug possessed some theraputic virtues.

B. The First Comprehensive Legislation

In 1936, Mississippi enacted the Uniform Narcotic Drug Act.[37] The act approached this state's need for internal regulation of narcotics use in a comprehensive fivefold manner. The legislation emphasized that it was "unlawful for any person to manufacture, possess, have under his or her control, sell, prescribe, administer, dispense, or compound any narcotic drug except as authorized."[38] Every person or association manu-

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[34]Act of Feb. 27, 1930, ch. 13, § 1 [1930] GEN. LAWS MISS. 13.

[35]Act of Feb. 26, 1934, ch. 339 [1934] GEN. LAWS MISS. 623.

[36]*Id.*

[37]Act of Mar. 16, 1936, ch. 289 [1936] GEN. LAWS MISS. 553.

[38]*Id.* The Act defined narcotic drugs to include "coca leaves, opium, cannabis, and every substance neither chemically nor physically distinguishable from them." There-

facturing any compound or preparation containing a restricted amount of a regulated narcotic substance was required to register and obtain a license from the State Board of Pharmacy. However, the provisions for licensing those dealing in narcotics did not apply to the use and administration of the drugs by registered physicians, dentists, or veternarians in the course of their professional conduct of preparing or dispensing the drugs for legitimate medical purposes. Prior to the issuance of the license, every applicant had to qualify by meeting prescribed standards, which included a showing of good moral character and a record disclosing no conviction for a willful violation of any state or federal narcotics law.

Further, limitations were placed upon the sale and distribution of narcotics by duly licensed manufacturers and wholesalers. The limitations restricted the transfer of narcotics to designated classes of medical or scientific professionals and, on special written orders accompanied by certificates of exemption as required by the federal narcotics laws, to persons in the employ of governmental subdivisions receiving or dispensing narcotics by reason of their official duties. In all instances official written orders were made necessary to obtain the transfer of narcotics. The act specifically exempted from its provisions restricting possession or control all common carriers or warehousemen and their employees acting in the scope of their employment, while actually engaged in lawfully transporting or storing narcotic drugs.

In almost every instance in which narcotics were transferred, both the transferor and the transferee were required to make a record evidencing the transfer and to retain a copy of this record for a period of two years. The only exceptions which existed to the necessity of close recordation related to the transfer of "narcotic drugs . . . professionally used in the treatment of any one patient, when the amount . . . [did] not exceed in any forty-eight (48) consecutive hours, (a) four grains of opium, or (b) two grains of codeine or any of its salts, (c) one-half of a grain of morphine, or any of its salts or (d) one-fourth of a grain of heroin

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fore after 1936 the legal consequences stemming from the unlawful possession or distribution of an illicit drug in Mississippi, whether that drug was marijuana or morphine, was the same.

The Act defined cannabis to include "(a) the dried flowery or fruity tops of pistillate plant Cannabis Sativa L., from which the resin had not been extracted...." However this definition was judicially expanded in 1937 when the Supreme Court construed the term "includes" to be less restrictive than the term "means," thereby finding a basis to uphold the conviction of an individual possessing a growing plant of marijuana in his backyard. The Court, in its decision, acknowledged its responsibility to strictly construe penal statutes. Harris v. State, 179 Miss. 38, 175 So. 342 (1937).

(sic) or any of its salts, or (e) a quantity of any other narcotic drug or any combination of narcotic drugs that [did] not exceed in pharmacologic potency of any of the drugs named above in the quantity stated."[39] The type of record required by the legislation was not outlined in the statute. Instead the State Board of Pharmacy was empowered to draft regulations relating to records, which in its discretion would best serve the purposes intended. To further its enforcement, this Board was also provided with ready access to the records of individual drug dealers by the provisions of the act.

The limitation placed upon dispensing narcotics by prescription, instituted in Mississippi by earlier legislation,[40] remained as one of the five fundamental regulatory techniques of the uniform act. The legislation provided that a physician had to prescribe, administer or dispense narcotics in good faith and then only when such action would be "in the course of his professional practice."[41]

In a series of decisions construing certain language appearing in the federal statute regulating the prescription of narcotic drugs which was identical to that of the Mississippi act, the physicians of Mississippi, as well as those from other parts of the United States, had been placed on notice to judiciously prescribe such substances or be subjected to harsh penal measures. In historic *Webb v. United States,*[42] the United States Supreme Court determined that a prescription for narcotics administered to an addict "not in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use"[43] did not constitute a prescription as that term was intended to be construed by the framers of the act. The *Webb* decision was followed closely by other decisions which further limited the immunity afforded by the federal act to physicians rendering medical services.

In *Jin Fuey Moy v. United States*[44] the Court construed the expression "in the course of his professional practice only" to preclude a physician from legitimately prescribing a narcotic to an addict for the single purpose of catering to his appetite or satisfying his craving. Other feder-

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[39]Act of Mar. 16, 1936, ch. 289, § 10 [1936] GEN. LAWS MISS. 558.

[40]Act of Feb. 5, 1900, ch. 107 [1900] GEN. LAWS MISS. 145.

[41]Act of Mar. 16, 1936, ch. 289, § 8 [1936] GEN. LAWS MISS. 556.

[42]249 U.S. 96 (1918).

[43]*Id.* at 99.

[44]254 U.S. 189 (1920).

al decisions[45] further construed the legislation in a manner resulting in the medical profession's treatment of addicts only on a most personal and individual basis, if at all, before the United States Supreme Court finally recognized that addiction was a disease subject to proper medical treatment including relief of its conditions of addiction.[46]

But the prescription provisions, like the provisions relating to the keeping of records, did not apply to every compound or preparation which contained a narcotic. So long as the narcotic contained in the prepared medication did not exceed certain specific limitations, the compound was not subject to the controls of the act. Every individual in the position of dispensing, prescribing, or administering a narcotic preparation exempted from the application of the act was placed under a duty in administering such compounds to use reasonable diligence to ascertain whether "such administering . . . [would] provide the person to whom or for whose use . . . such preparations [was] prescribed . . . within forty-eight (48) consecutive hours, with more than four grains of opium or more than one-half grain morphine or of any of its salts, or more than two grains of codeine or any of its salts, or more than one-quarter of a grain of heroin or any of its salts".[47] If such individual through reasonable diligence discovered that the person to whom the compound was to be administered would be provided with a prescribed amount of exempt narcotics within the stated period, he was prohibited from dispensing the compound. This limitation was inapplicable to physicians, attempting in good faith in the course of their professional practice to alleviate the suffering of patients afflicted with disease, when such suffering could be alleviated by the administration of narcotics in greater quantities than those specified in the exemption.

The uniform act also incorporated as a method of control the requirement that to every package prepared for transfer the transferor had to securely affix a label on which designated information was shown. In the instance when a label was affixed by a manufacturer or wholesaler, no person except an apothecary, and then only in the course of his professional conduct, could lawfully alter, deface, or remove the label. Once a narcotic reached the hands of the consumer-patient, possession

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[45]*See* United States v. Behrman, 258 U.S. 280 (1920) which construed an indictment purposely drawn whereby it failed to allege that the physician wittingly prescribed narcotics not in the course of an attempted cure as valid. The decision made clear that the question of a physician's good faith and adherence to fair medical standards was not requisite for conviction under the statute.

[46]*See* Linder v. United States, 268 U.S. 5 (1925).

[47]Act of Mar. 16, 1936, ch. 289, § 9 [1936] GEN. LAWS MISS. 557.

was lawful only if the drug remained in the container in which it was delivered until its use.

Finally, the enactment approached the addiction problem by prescribing commitment for one adjudged to be an habitual user of habit forming drugs. Such proceedings were instituted by affidavit duly verified by a person claiming to have knowledge of the addiction of another, such fact being set forth in the affidavit. Upon the affidavit being filed with the district attorney and proper notice of the charge being given to the accused, the judge of any court of competent jurisdiction heard "the evidence presented and [appointed] a commission of two physicians . . . [to] examine such person and certify to the court as to whether such person [was] a (sic) habitual user of habit forming drugs as contemplated"[48] in the act.

Upon being satisfied that all the allegations of the affidavit were true, the judge made and filed an order compelling the adjudged addict to submit to and continue treatment for his addiction at a private institution with medical supervision of his choosing approved by the State Board of Pharmacy. If the addict was unable to afford private treatment, then the legislation provided that he should be committed for treatment to a hospital or institution owned by the United States and at the expense of the United States.

In the event that the evidence of addiction at the hearing failed to satisfy the presiding judicial officer as to the habitual use of habit forming drugs by the accused, the judge was empowered to order his commitment for a period not exceeding thirty days in order to obtain further evidence needed to render a decision in the case.

The portion of the act permitting judicial commitments of addicts was specifically "designed to rehabilitate them and restore them to mental and physical health."[49] To further the stated purpose of restoring addicts to mental and physical health, the statute placed within the sound discretion of the trial court, in the instance of criminal proceedings, the authority to stay such proceedings or defer the imposition of sentence and commit the defendent to a rehabilitative public hospital, when it appeared that he habitually used narcotic drugs. However, the language of the act did not go so far as to commute the criminal action. Upon the defendant's discharge from treatment, once again he became subject to criminal prosecution.

The act also vested trial courts with the authority to commit to state hospitals upon proper medical recommendation those persons who

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[48] *Id.* § 18.

[49] *Id.* § 18 (b).

voluntarily made application for the treatment of drug addiction. Any person voluntarily committed could not be detained under the voluntary agreement for more than ten days after he notified the hospital or institution of his intention to leave.

Obtaining compounds or preparations containing a regulated amount of narcotics by procedures differing from those outlined in the act for any purpose other than the use, sale, or distribution in the conduct of a lawful business in such drugs or in the course of legitimate medical treatment was unlawful. Penalties set out in the act for its violation included a fine not to exceed five thousand dollars, a term of imprisonment not to exceed five years, or both. For any subsequent offense the maximum amount of the fine was increased to ten thousand dollars and the maximum term of imprisonment was increased to ten years. The penal provisions of the legislation did not differentiate between possession for personal use in violation of the act and possession of narcotics for the purpose of trafficking in the drug. Obviously the legislation was not geared primarily toward stopping drug abuse by punishing the abuse of narcotics, but the fact remains equally clear that its thrust was not solely in the direction of recognition of abuse problems and attempted rehabilitation.

Further, upon the conviction of any health professional, manufacturer or wholesaler for the violation of a provision of the act, the board or officer by whom the convicted defendant had been licensed to practice his profession or to carry on his business was empowered in its discretion to suspend or revoke his license or registration. The burden of proving that the alleged violation was covered by an exception proviso or exemption was placed upon the one accused of violating the act.

Legislation enacted in 1940 made unlawful the unauthorized sale, distribution, or possession within the state of Mississippi of medicine containing any quantity of barbituric acid.[50] With one exception,[51] one was authorized to possess or trade in barbituric acid only when in possession of a lawful prescription by a medical professional "possessing a current federal narcotic license"[52] or as a wholesaler or manufacturer selling such preparations to a licensed dealer in drugs. As in the case of similar legislation restricting the sale of narcotic drugs, apothecaries

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[50]Act of Mar. 20, 1940, ch. 297 [1940] GEN. LAWS MISS. 532.

[51]*Id.* ". . . [N]othing in this . . . act shall restrict or prevent the sale of patent or common medicines handled and sold by stores and commissaries, which medicines have been prepared . . . for the exclusive use in the treatment of sick mules . . . or other such animals." *Id.*

[52]*Id.*

were statutorily prohibited from refilling prescriptions for medicines containing barbituric acid.

The enactment imposed a duty upon every circuit judge in the state to call to the attention of every grand jury assembled "the evil effects of barbituric acid."[53] It also placed a duty of enforcement upon every law enforcement officer, physician, pharmacist, dentist, and veterinarian within the state.

One charged and convicted of violating the provisions of the act was deemed to be guilty of a misdemeanor and subject to the penalties provided by law for such offenses.

After the 1940 enactment only minor changes[54] occurred in the Mississippi law controlling drug abuse until 1952. In that year the penalty for the sale of barbituric acid without a lawful written prescription having been presented was increased and differentiated, and the severity of the penality imposed upon conviction for violation turned on whether the act was committed against a minor or an adult.[55] A violation of the act which consisted of selling barbituric acid to a minor, followed by conviction, carried a minmum term in the penitentiary of one year. If the person against whom the offense was committed was an adult, conviction carried a fine of not less than fifty dollars, nor more than five hundred dollars, or internment in the county jail for not less than ten days nor more than six months, or both such fine and imprisonment.

In 1952 marijuana once again came under the scrutiny of the legislature, and as a result greater penalties were imposed for its unlawful sale or possession.[56] Whereas the act of 1934 made violation of its provisions punishable as a misdemeanor, legislation emanating from the 1952 session provided that marijuana violations should be punishable as a felony. The legislation, just as that passed at the same session relating to barbituric acid, differentiated as to the severity of the penality imposed upon the basis of whether the offense was perpetrated against a minor or an adult. Further, the penal sanctions of the act became harsher for subsequent offenses.

In the instance of sale or distribution of marijuana to a minor, upon conviction for the violation as a first offense, minimum punish-

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[53]*Id.*

[54]The Uniform Narcotic Drug Act, enacted in 1936, was amended in 1944 to include and define isonipecaine. Ch. 271 [1944] GEN. LAWS MISS. 477.

[55]Act of Apr. 12, 1952, ch. 256 [1952] GEN. LAWS MISS. 287.

[56]Act of Apr. 14, 1952, ch. 261 [1952] GEN. LAWS MISS. 289.

ment was established as a fine of not less than five thousand dollars and imprisonment for not less than five years. Subsequent offenses were punishable by fines not to be less than ten thousand dollars and terms of imprisonment not to be less than ten years. The maximum penal sanctions which could be meted out by the trial court were increased to ten thousand dollars in fine and ten years imprisonment for a first offense and twenty-five thousand dollars in fine and twenty years imprisonment for each subsequent offense.

Violation of the act, when prosecuted as a first offense violation committed against an adult, was punishable upon conviction by a fine not to exceed five thousand dollars *or* by imprisonment in the penitentiary for a term not exceeding five years *or* both such fine and imprisonment. For any subsequent offense a doubling of the maximum fine and imprisonment was authorized.

The amendment further served to clarify that possession of marijuana and narcotics as defined in the act, was unlawful and, in itself, constituted presumptive evidence that such possession was for the purpose of illegally trading in the substance in violation of the statute. Finally, it broadened the definition of cannabis to correspond to the announced judicial construction of the term as used in a previous enactment[57] that "all parts of the plant . . . whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture or preparation of such plant"[58] was that which the legislation was enacted to regulate. The only limitation placed upon the possession, use, or sale of cannabis by its definition was that the term was not to include the mature stalks of the plant or the fiber produced from such stalks.

In 1960 legislation was enacted which broadened the scope of the drug regulations in regard to the substances defined as narcotic drugs.[59] The act inadvertently changed the function of classifying new narcotic drugs from the State Board of Pharmacy to the State Board of Health.[60] This error was rectified by subsequent legislation, however, which reinvested the State Board of Pharmacy with the power to classify new substances as narcotic drugs.[61]

Again the penalties for violation of the act were increased.[62] When

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[57]*See* Act of Feb. 27, 1930, ch. 13, § 1 [1930] GEN. LAWS MISS. 13.
[58]Act of Apr. 14, 1952, ch. 261, § 4 [1952] GEN. LAWS MISS. 292.
[59]Act of May 11, 1960, ch. 348, § 1 [1960] GEN. LAWS MISS. 520.
[60]*Id.* § 2
[61]Act of Mar. 1, 1962, ch. 397 [1962] GEN. LAWS MISS. 692 (repealed 1971).
[62]Act of May 11, 1960, ch. 348, § 3 [1960] GEN. LAWS MISS. 523.

the violation proved to be the second or subsequent offense of any provision of the Mississippi act or when the offender had been previously convicted for violation of the laws of the United States or of any other state relating to narcotic drugs or marijuana, a minimum fine and term of imprisonment was made mandatory. Second offenders were to be fined three thousand dollars and imprisonment for not less than five years, while third or subsequent offenders were to be fined not less than five thousand dollars and imprisonment for not less than ten years. Providing a narcotic or amphetamine to one eighteen years of age or younger was punishable by fine not to exceed ten thousand dollars or imprisonment in the peniteritary for a term of not more than thirty years, or both.

By the decade succeeding 1950, the hysteria of the drug abuse phenomenon had begun to sweep the United States, and that hysteria, not actual abuse, was the root of much legislation in Mississippi. The statutory enactments of this state's legislature, which increased the regulatory aspects as well as the penal sanctions of the narcotic laws, closely adhered to the pronouncements on the subject by the regulatory agencies of the federal government. However, the problem spoken to by the pronouncements of the federal government was not as foreign to sister states of a more urban composition as it was to the rural south. The legislation presented a timely attempt to prevent the spread of drug abuse to this state rather than an attempt to cure an exising infirmity.

C. The Comprehensive Legislation of 1962

1. *Barbituric Acid and Stimulant Control Act*

Although legislation was enacted during the 1940 session of the Mississippi legislature to regulate the distribution and use of compounds containing barbituric acid[63] and legislation was enacted in the 1952 legislative session to impose greater penalties for the violation of this act,[64] not until 1962 was a statute enacted which regulated the use and distribution of barbiturates and stimulants in a comprehensive manner.[65] The Barbituric Acid and Stimulant Control Act prohibited the delivery of any barbituate or stimulant unless is was delivered in the manner outlined by the act.[66] A pharmacist upon the prescription of a physician could make delivery when he affixed to the container a label detailing specific information relating to the physician, the patient, and

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[63]*See* Act of March 20, 1940, ch. 297 [1940] GEN. LAWS MISS. 532.

[64]*See* Act of April 12, 1952, ch. 256 [1952] GEN. LAWS MISS. 287 (repealed 1971).

[65]Act of Mar. 1, 1962, ch. 396 [1962] GEN. LAWS MISS. 686 (repealed 1971).

[66]*Id.* § 2.

the directions for the use of the compound. Refills were allowed only as designated by the prescription. A physician could deliver such drugs "in the course of his practice" but he also was required to label the container. Possession without a prescription, refusal of a pharmacist to keep specific records, or failure upon proper demand of a pharmacist to reveal the records which the act required all constituted violations.

Certain exemptions to the requirements of the act were also included, however. If preparations containing barbituric acid did not contain a quantity sufficient to induce "a hypnotic or somnifacient effect"[67] or if the preparation was intended for external application, it was exempt from the regulation of the act. Further, patent or common medicines designed by reputable manufacturers for the exclusive use in the treatment of sick animals remained exempt from the regulations of this act. Exemptions from that portion of the act requiring strict labeling of the container in which the drugs were possessed, as well as the provisions proscribing possession without a prescription, were granted to several classes of individuals while engaged in the performance of their official duties.[68] The listed classes included pharmacists, physicians, individuals engaged in scientific research, teaching and testing, hospitals which procured the substances for dispensation by medical practitioners, the personnel of enforcement agencies, manufacturers and wholesalers, and common carriers and warehousemen.

These exempt classes, however, were required to make and retain complete records of all stocks of barbiturates and stimulants in which they dealt.[69] Further, these records were available for inspection at all reasonable hours to the personnel of the State Board of Pharmacy.[70]

The penalties for the unlawful possession or delivery of barbiturates and stimulants were greatly increased by the legislation.[71] While under the regulatory statute existing prior to the passage of this act, a violation was punishable as a misdemeanor when the offense was committed against an adult and carried the imposition of a one to five year prison sentence when committed against one eighteen years old or younger, under this act a first offense violation carried a fine of not more than one thousand dollars and imprisonment for not more than five years. Increasingly harsher penalties were provided for second and subsequent offenses and for violations which were committed against minors.

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[67] *Id.* § 3.
[68] *Id.* § 4.
[69] *Id.* § 5.
[70] *Id.* § 6.
[71] *Id.* § 8.

2. *The Uniform Narcotic Drug Act of 1962*

By 1962 the passage of legislation relating to the control of narcotics without repeal of former legislation had conglomerated the existing law. However, the Uniform Narcotic Drug Act of 1962[72] repealed the early legislation, which had subsisted coincidentally with the uniform legislation of 1936, and amended that legislation to place greater emphasis upon conformity to the federal regulation of narcotics and to provide more severe penalties for violation of the narcotic drug law.

The right to classify new products as narcotic drugs, which had erroneously been vested in the State Board of Health by legislation in 1960,[73] was again placed within the State Board of Pharmacy. Further, a new criteria for determining which new products were to be classified as narcotic drugs was outlined. "[A]ny drugs found by the State Board of Pharmacy . . . to have an addiction-forming or addiction-sustaining liability similar to morphine or cocaine"[74] were to be so classified. After notice and the right to be heard were afforded to interested parties, such determinations were to become effective upon a date chosen in the discretion of the board.

Replacing the exemption concept of earlier legislation which enumerated specific amounts of restricted substances as exempt from regulation, the 1962 legislation exempted narcotic compounds upon an inverse basis to that which it provided for the inclusion of new narcotics. If a narcotic preparation was determined to possess no addiction-forming or addiction-sustaining liability or if that liability which it did possess was insufficient to require regulation, and if the preparation would not permit simple chemical recovery of the narcotic drug which it contained, it was exempt.[75] The State Board of Pharmacy was authorized to exempt any pharmaceutical preparation determined to be exempt under federal narcotics law without making its own determination. Conversely, the board was empowered to terminate exemption status based upon the same criteria. Termination required that the board make findings that the preparation possessed addiction liability and that, in its opinion, its unregulated use resulted in abuse. The findings were to be published in a newspaper of general circulation. Such findings were final, and the status of exemption ceased at the expiration of a period of six months from the date of publication.

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[72]Act of Mar. 1, 1962, ch. 397, § 6 [1962] GEN. LAWS MISS. 696 (repealed 1971).

[73]*See* Act of May 11, 1960, ch. 348, § 2 [1960] GEN. LAWS MISS. 520.

[74]Act of Mar. 1, 1962, ch. 397, § 3 [1962] GEN. LAWS MISS. 694 (repealed 1971).

[75]*Id.* § 4.

The penal section of the 1962 legislation retained the provision of the prior uniform enactment which imposed more severe penalties for repetitive violations. However, the uniform act of 1936 was restructured whereby the sanction for the illegal sale or delivery of narcotics was clearly differentiated from mere illegal possession of a restricted preparation. Further, delivery to one under the age of twenty-one, rather than to one eighteen or under as prescribed by earlier legislation, was made the focus of harsher penalties.[76]

In prescribing penalties for the violation of the narcotics law, *the degree of harm caused by the various narcotics was not considered.*[77] A single violation of the act, other than a violation consisting of an unlawful sale or delivery, resulted in a fine not exceeding two thousand dollars and imprisonment for a term not less than two years nor more than five years. A second offense occasioned a term of imprisonment increased from a minimum of two years to a minimum of five years; the monetary sanction remained the same. For subsequent offenses minimum imprisonment was to be ten years. Only in the instance of a first offense violation was the court competent to suspend the sentence or place the offender on probation. Likewise, only first offenders were eligible for parole before the minimum imprisonment had been served.

When the violation of the act consisted of unlawful delivery of a narcotic to one over twenty-one years old, the periods of incarceration increased, based upon the number of violations. First offenders were to be imprisoned for not less than five nor more than ten years, and second and subsequent offenders were to be imprisoned not less than ten nor more than twenty years. In each instance conviction also carried a maximum fine of two thousand dollars.

Finally, the penalty for the delivery of a narcotic to one under twenty-one years old was fixed as a fine not exceeding twenty thousand dollars and confinement in the penitentiary for a period not less than twenty years. The trial court was given discretion to confine one convicted of such an offense for a term encompassing *his entire natural life.*

In 1966 the Mississippi legislature classified lysergic acid diethylamide, commonly known as LSD, as a narcotic drug[78] and amended the penal section of the act to punish third offenders of the illegal sale narcotics laws by life imprisonment.[79]

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[76]*Id.* § 5.

[77]*Id.*

[78]Act of June 17, 1966, ch. 449, § 1 [1966] GEN. LAWS MISS. 854.

[79]Act of May 6, 1966, ch. 450, § 1 [1966] GEN. LAWS MISS. 856.

Prior to the recently enacted remedial legislation, the penalties imposed for the violation of this state's regulatory narcotics laws were based upon an unrealistic classification. Identical penalties were imposed for violation irrespective of whether the violation related to marijuana or heroin.[80] The legislation, in direct conflict with acknowledged medical fact, grouped several substances under the definition of "narcotic drugs," while in reality at least two of three substances fell within the classification of hallucinogenics.[81] Further, the existing law made scant provision for rehabilitation of the user or addict and did little to educate society to the dangers of drug abuse.[82]

III. An Analysis of The Uniform Controlled Substances Act of 1971

The Uniform Controlled Substances Act of 1971 abolishes the diverse laws dealing with drugs in this state and establishes a comprehensive drug act covering all aspects of the problem. The more controversial and significant parts of the 1971 Act will be analyzed. The inquiry centers around the areas that most affect the general public and upon which the members of the bench and bar have been and will be implored to provide comment and explanation.

A full discussion of drug abuse in relation to the 1971 Act and the possible ramifications of the new law far exceeds the physical limitations of this paper. The immediate discussion is intended to be extensive enough to provide the practitioner with a knowledge of the substance of the 1971 Act, the various interpretations that may or have been given the law, and any possible alternative or considerations that may now or at some later time ripen into cause for possible and necessary change in either the law itself or its interpretation. Accomplishing this goal requires a look at the three major divisons in the 1971 Act: (1) classification of the controlled substances, (2) penal sections of the law, and (3) educational, research and rehabilitative provisions.

A. Drug Classification

1. *The Structure of the Law*

The first question to be asked concerning any drug law is whether or not the classification of the substances is realistic. Mississippi's classification arrangement is based upon that of the Federal Drug Control

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[80]*Id.*

[81]*Id.*

[82]Miss. Code Ann. § 6216-02 (1956).

Act of 1970.[83] This grouping was followed and used by the National Conference of Commissioners on Uniform State Laws in adopting their Uniform Controlled Substances Act in 1970.[84] Mississippi adopted this classification verbatim.[85]

After the Mississippi law sets out its purpose,[86] establishes the Mississippi Bureau of Drug Enforcement within the State Board of Health,[87] and defines the terms used in the Act,[88] the law categorizes drugs into five separate groups or schedules.[89] The basis for the division is the individual drug's potential for abuse, accepted medical use, safe use under medical supervision, and whether abuse of the drug may lead to physical or psychological dependence.[90] Schedule I includes drugs with a high potential for abuse, wihout any accepted medical use, and lacking safety even under medical supervision. This group of 81 substances includes those drugs that are best known to the average person such as heroin, LSD, marijuana, mescaline, and peyote.[91] The 22 drugs in Schedule II also have high abuse potential, but with severe restrictions they have recognized medical use. Abuse of these drugs is said to "lead to severe psychic or physical dependence."[92] Opium, cocaine, and methadone are included in this group. Schedule III includes the stimulants amphetamine and metamphetamine (speed) and the depressant barbiturates and their derivatives. This schedule also includes preparations containing a certain amount of a narcotic having a potential for abuse lower than that of the previous schedules and with accepted medical use in treatment and whose abuse "may lead to moderate or low physical dependence or high psychological dependence."[93] Schedule IV encompasses drugs with low abuse potential, approved medical use, and limited physical or psychological dependence in relation to Schedule III drugs. Schedule IV includes barbital and phenobarbital.[94] Schedule V drugs include various mixtures which contain opium and/or codeine in minute

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[83]84 Stat. 1245, 1247, 21 U.S.C. §§811-12.

[84]NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM CONTROLLED SUBSTANCES ACT, 223 (1970) [hereinafter cited as 1970 COMMISSIONERS' ACT].

[85]MISS. CODE ANN. §§ 6831-51 to-88 (Supp. 1971).

[86]*Id.* § 6831-52.

[87]*Id.* § 6831-53.

[88]*Id.* § 6831-56.

[89]*Id.* §§ 6831-57 to -61.

[90]*Id.*

[91]*Id.* § 6831-57.

[92]*Id.* § 6831-58.

[93]*Id.* § 6831-59.

[94]*Id.* § 6831-60.

quantities and which are considered to be less dangerous than those in the other schedules.[95]

The State Board of Health is empowered to add, delete, or reschedule a substance covered by the act by considering the same physiological and social criteria as the United States Attorney General must consider in making the same determination about the federal law. The eight guidelines are:

> (1) The actual or relative potential for abuse;
> (2) The scientific evidence of its pharmacological effect, if known;
> (3) The state of current scientific knowledge regarding the substance;
> (4) The history and current pattern of abuse;
> (5) The scope, duration, and significance of abuse;
> (6) The risk to the public health;
> (7) The potential of the substance to provide psychic or physiological dependence liability; and
> (8) Whether the substance is an immediate precursor of a substance already controlled under this article.[96]

It should be noted that if a substance is added, deleted, or rescheduled under the federal law and the State Board of Health is given notice of the action, the State Pharmacy Board shall control the drug under the terms of the Mississippi Act unless either these two agencies or the Bureau of Drug Enforcement object. In that case a hearing shall be held with the objections being published and all interested parties given an opportunity to be heard. The Board of Health's decision is also published and final unless altered by statute.[97] Since specific, identifiable standards are used by the board and since the legislature is empowered to change a decision of the board, the touchy question of whether or not this is an unconstitutional delegation of legislative power to an administrative board is hopefully avoided. Nevertheless, only a court decision can adequately answer this problem.

The Act also empowers the State Board of Pharmacy to regulate and control the manufacture, distribution, and dispensing of the controlled substances, and strict licensing requirements are stipulated.[98] The issuance of search warrants and administrative inspection warrants is authorized, and warrants are to be executed by state judges according

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[95] *Id.* § 6831-61.
[96] *Id.* § 6831-55(a)(1)-(8).
[97] *Id.* § 6831-55 (d).
[98] *Id.* §§ 6831-63 to -69.

to stringent procedural requirements.[99] Drug enforcement officers are authorized to carry firearms and make searches, arrests, and seizures of property pursuant to the Act.[100]

2. *Other Classification Alternatives*

A very specific and technical approach has been used by Mississippi's Uniform Act because of the technical nature of the substances with which the law deals. Literally hundreds of drugs have a high potential for abuse. The technical nomenclature and classification of the substances require a sound method of dealing with them. Nevertheless, the possibility does arise that we may not be handling the situation in a totally realistic and practical manner. From a medical standpoint the schedule classification of the 1971 Act may be the obvious solution. But the classification for the purpose of penal sanction and research, educational, and rehabilitative programs may dictate an alternate approach. What is ideal and workable from a medical viewpoint may not be adequate to solve the social problem. This is not necessarily to suggest that the eight factors of § 6831-55 allowing for deletion, rescheduling, or designation of controlled substances will not enable the act to effectively combat the drug problem. But other ideas have been advanced concerning the classification of the drugs to be controlled.

Neil Chayet, a Massachusetts attorney who has served as a consultant for the National Institute of Mental Health's Center for Studies of Narcotic and Drug Abuse, has suggested a fourfold categorization of the drugs that are most abused. First to be regulated are the true narcotics, such as heroin and morphine, which are physically addicting. The second category would be the hallucinogenic drugs such as LSD and philocybin which seem to cause damage to body functions. Marijuana, the drug most abused by young people, would be a third category necessitating special attention from the law. The fourth group would include all other dangerous drugs, such as barbiturates and amphetamines.[101] This approach, categorizing drugs according to their abuse tendencies, would perhaps be more easily justified from the standpoint of handing out punishment and providing research and rehabilitative facilities.

Connecticut's omnibus drug act, which took effect in 1967, has been called "the most comprehensive and forward-looking legislation dealing with drug abuse."[102] The approach toward control of the abusive sub-

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[99]*Id.* §§ 6831-75 to -76.

[100]*Id.* § 6831-75.

[101]Chayet, *supra* note 7, at 11.

[102]*Id.* at 18; CONN. GEN. STAT. ANN., PUBLIC ACT 555, §§ 1 (13) (18), 36 (b), 37 (b), 40(a), 49(a), 61, and 68 (1967), are cited as authority in Chayet, *supra* note 7, at 18-20.

stances focuses mainly upon education and treatment. The act, providing for both marijuana and LSD, plainly divides them according to their separate effect upon body and mind. Amphetamines, barbiturates, hallucenogens, including LSD, cocaine, and marijuana are all separately defined in order to determine the differences in their common properties. Two separate categories of "narcotic drugs" and "controller drugs" are also established. Possession of controlled drugs like LSD is a misdemeanor punishable by up to one year in jail or a $1,000 fine or both for each conviction. A greater penalty is imposed for manufacturing, selling, or trafficking in the drugs.

The most progressive features of the Connecticut law are its educational and rehabilitative goals. The courts in their discretion may provide medical treatment for an offense rather than a jail sentence and fine. Since drug dependence can cause serious problems of the mind and body, Connecticut provides both medical and psychiatric help to cope with the mental and physical disturbances that are caused by using the more dangerous drugs like heroin, metamphetamine, and LSD. Emergency care is also provided in instances where "bad trips" from hallucinogens recur weeks or months after the initial exposure. The law further states that the effects of misuse of alcohol and the controlled drugs upon the individual and society shall be taught to all pupils in public school above the fifth grade. State colleges also must teach drug abuse classes plus provide instruction on the best ways in which to teach the subject.[103] The Connecticut law thus exemplifies an official recognition of the need for treating drug abuse as a decay that affects both the mind and body. This fact, in turn, requires the strong educational and rehabilitative legislation that Connecticut has seen fit to enact.

Even though research in the area of drug abuse is not complete, many volumes of studies by commissions, pharmacists, psychiatrists, sociologists, doctors, and law enforcement officials have contributed to the total amount of knowledge of drugs. The recent Illinois case of *State v. McCabe*[104] provides the best concise description at this time from a legal point of view, of the effects of the major abused drugs upon the human body and mind. The drugs analyzed include heroin, morphine, cocaine, marijuana, barbiturate, amphetamines, and the "psychedelics" like LSD.[105] The text of the effects of these substances is included in Appendix I.[106]

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[103] *Id.*

[104] 49 Ill. 2d 338, 275 N.E.2d 407 (1971).

[105] *Id.* at 410-12.

[106] Following the classification discussion, the court in *McCabe* held that the classification of marijuana under a statute having a mandatory ten-year sentence

B. Penalties and Prohibitions

The penalty sections of previous laws in Mississippi obviously did not have the effect of curtailing the increase in drug abuse.[107] Harsh penalties failed to be a deterrent factor and greatly curtailed any real attempt at rehabilitation.

Attempting to remedy this situation, the new law adopted a reconstructed penalty section which was taken in great measure from the new federal legislation and almost verbatim from the 1970 Uniform Controlled Substances Act of the National Conference of Commissioners on Uniform State Laws.[108] Penalties under this new Mississippi legislation differ according to what specific act a person is committing. Penalties for one who would "manufacture, deliver, or possess" a controlled or counterfeit substance are divided into two categories: For the narcotic drugs found in Schedules I and II the maximum penalty is six years imprisonment, or a two thousand dollar fine or both. For all other substances in Schedule I, II, and III, maximum penalties are four years imprisonment or a two thousand dollar fine or both. A Schedule IV violation carries a two year imprisonment or a one thousand dollar fine or both; and a Schedule V violation is a misdemeanor punishable by a six month confinement or a five hundred dollar fine or both. It is important to note that Mississippi's law punishes one who would "manufacture, deliver, or possess" a prohibited substance,[109] while the federal law and the Uniform Act of the Commissioners adds the phrase "with intent" to manufacture or dispense.[110] Then, however, the Act makes it illegal knowingly or intentionally to possess a controlled substance without a valid prescription. This offense is a misdemeanor punishable by six-months incarceration or a five hundred dollar fine or both.[111]

The above language has caused more controversy than any other provision of the Mississippi Act. This was brought about by the fact that the penalty for possession of the controlled substances could conceivably be either a felony or a misdemeanor. Since the Act gave the trial judges the discretionary power to suspend a first offender's sentence,[112] and since an offender could be charged for either a felony or

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upon first conviction, rather than under a more recent law with a maximum one year jail term for first offense and with no prohibition of probation, was arbitrary and deprived the appellant of equal protection. *Id.* at 414.

[107] *See supra* notes 4 and 5.

[108] 1970 COMMISSIONERS' ACT, *supra* note 84.

[109] MISS. CODE ANN. § 6831-70(a), (b) (Supp. 1971).

[110] 84 Stat. 1260, 21 U.S.C. § 841 (1970); and 1970 COMMISSIONERS' ACT, *supra* note 84.

[111] MISS. CODE ANN. § 6831-70 (c) (Supp. 1971).

[112] *Id.* at § 6831-74 (d) (Supp. 1971).

misdemeanor for possession, the sentences for the same prohibited act could very well differ from one judicial district to another.

On March 27, 1972, the Mississippi Supreme Court was faced with the issue of which penalty would be applied to one convicted of possession of a controlled substance. In *Johnson v. State*[113] the court affirmed a conviction for possession of LSD but remanded the case for resentencing under the misdemeanor provision. The court's reasoning was simply that the rule of *Grillis v. State,*[114] a 1944 decision, was applicable. Quoting from *Grillis,* the court said, "[w]hen there is substantial doubt as to which of the two [penalties] is to be applied, the case will be referred to the statute which imposes the lessor punishment."[115] Marijuana was given the same treatment as LSD in *Wolf v. State,*[116] decided the same day. Justice Sugg's strong dissent sought to distinguish *Grillis* and noted that the legislature's intent was to permit punishment either as a felony or a misdemeanor, discretion being vested in the trial judge.[117]

It is submitted that the *Johnson* opinion is most unsatisfactory because it avoided any mention of the real and pressing issues that were presented by the facts and which are still at stake. The brief for the State in *Johnson* alleged that the clear intent of the drafters of the Act was to make possession of the controlled substances a felony rather than a misdemeanor. This, the State said, was accomplished by leaving out the words "possess with intent to manufacture or deliver" from the felony provisions of § 6831-70. It was further argued that the misdemeanor portion of the section was to be applicable only to those drugs which could be obtained by a prescription.[118]

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[113]260 So. 2d 436 (Miss. 1972).

[114]190 Miss. 576, 17 So. 2d 525 (1944).

[115]Johnson v. State, 260 So. 2d 436, 439 (Miss. 1972).

[116]260 So. 2d 425 (Miss. 1972).

[117]Johnson v. State, 260 So. 2d 436, 439 (Miss. 1972) (dissenting opinion).

[118]*Id.* Brief for Appellee. In the brief the State said:

> The primary architects of the legislation . . . believed that proof of intent to sell was simply too great a burden to place on local prosecutors and, most important, possession of extraordinarily dangerous substances simply ought to be punished as a felony rather than as a misdemeanor.
>
> . . . On the other hand, the language of the federal misdemeanor provision was left virtually intact . . . because (Senator) Collins has assured . . . the . . . members that subsection (c) dealt only with the substances which could be obtained by a valid prescription but which had been obtained without one. . . . Thus, in this jurisdiction, one who obtains and possesses a drug . . . without a valid prescription where that drug could be lawfully obtained pursuant to a prescription, is guilty of a misdemeanor.

The original 1970 Act of the National Conference of Commissioners on Uniform State Laws throws a great deal of light on the meaning that was to be given the penalty section. Since the "intent to manufacture or deliver" was the only phrase in all the penalty section omitted from the Mississippi law, the comment of the Commissioners on the meaning of the entire section as a whole is most enlightening:

> Subsection (c) has been drafted specifically to provide for a lesser penalty for *simple possession* than is provided for the *trafficking and illicit manufacturing type offense* under subsections (a) and (b). It is contemplated that subsection (a) and (b) will contain harsh penalties . . .; subsection (c) provides for misdemeanor . . . treatment for the simple possession charge, (emphasis added).[119]

It would seem that by merely omitting the words "with intent to manufacture or deliver" from the Mississippi law under subsection (a) and (b) of § 6831-70, the legislature's otherwise verbatim adoption of the penalty section of the 1970 Act of the Commissioners may not void the comment of the original authors of the provision. Leaving out "intention" from subsections (a) and (b) perhaps would not lessen the original meaning that the language was to apply to "trafficking and illicit manufacturing type offenses."[120] This reasoning is in accord with that of Congress when the 1970 federal law was being adopted. At that time it was noted: "Possession of controlled drugs is made a misdemeanor, except where the possession is for the purpose of distribution to others."[121]

By avoiding these two major arguments concerning this major penalty section of Mississippi's Uniform Controlled Substances Act, the court has obviously placed the burden to provide a satisfactory explanation upon the legislature. The specific action the legislature might eventually take is a matter for conjecture; however, the authors contend that the main thrust of legislative concern will be in the area of penalties for possession of LSD and marijuana—the subject of the *Johnson* and *Wolf* decisions. Any potential new law should gear its penalties to consider the nature of the offense, the quantity of the drug, and the accused's prior record. It also would be desirable for Mississippi to broaden the rehabilitative provisions for offenders, as has been done in Connecticut.

The other major penal provision of the Uniform Controlled Substances Act of 1971 is § 6831-74, which deals with distribution to minors,

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[119] 1970 COMMISSIONERS' ACT, Comment on § 401, *supra* note 84 at 248.

[120] *Id.*

[121] 3 U.S. CODE CONG. & AD. NEWS 4570 (1970).

penalties for first and subsequent offenses, and the availability of resentencing for first offenders convicted prior to the passage of this new law.[122]

Anyone over 21 years old who delivers narcotic drugs to one under 21 is subject to a two thousand dollar fine and up to twelve years imprisonment or both. Anyone over 18 years old who delivers any controlled substance to a person under 18 is subject to the fine and double the prison term for comparable drug trafficking under § 6831-70.[123] For second and subsequent offenses contrary to any portion of the 1971 Act, a person can receive both a doubled fine and imprisonment, except for the simple possession charge under § 6831-70 (c).[124] This policy statement, providing greater punishment for "pushers" of illicit drugs, strengthens the contention that the felony provisions of the new act were meant to strike hardest at those who would profit from the traffic in illegal narcotics and not at the person who is made a felon for possession of a small quantity of a controlled substance. Section 6831-74 further gives the trial judge the power to suspend any and all of the penalty for a first offender. It should be noted that this first offender treatment is discretionary with the judge and is not available as a matter of right.[125]

One point of interest in § 6831-74 concerns the resentencing of those persons convicted prior to the passage of the 1971 Act. Persons in prison under earlier drug statutes are allowed to petition the courts of original jurisdiction for resentencing according to the new law,[126] and the Mississippi Supreme Court has consistently upheld this procedure.[127]

C. Education, Research, and Treatment

Mississippi's 1971 Drug Law contains two comprehensive sections dealing with education and rehabilitation in the field of drug abuse.[128]

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[122]MISS. CODE ANN. § 6831-74 (Supp. 1971).

[123]*Id.*

[124]*Id.* at § 6831-74(a), (c).

[125]*Id.* at 6831-74 (d).

[126]*Id.* at 6831-74 (f).

[127]Smith v. State, 248 So. 2d 436, 439 (Miss. 1971) in which the court said:

> Appellant is a young man twenty-two years of age, and according to the record in this case, is a first offender, and we deem it proper and in keeping with the intention of the Legislature that his conviction be affirmed, but that the case be remanded to the trial court for an imposition of a sentence in accordance with the provisions of the Uniform Controlled Substances Act.

See also Sims v. State, 257 So. 2d 210 (Miss. 1972); Pooley v. State, 257 So. 2d 213 (Miss. 1972); and Gisch v. State, 259 So. 2d 118 (Miss. 1972).

[128]MISS. CODE ANN. §§ 6831-81,-82 (Supp. 1971).

By the provisions, the Mississippi Bureau of Drug Enforcement, State Board of Education, State Board of Pharmacy, and State Board of Health are given broad powers to aid in the fight against the misuse of drugs. These powers include organizing both public and law enforcement educational programs, studying and using new techniques in research activities, promoting better recognition of the problem of drug abuse, and allowing the possession and distribution of the controlled substances plus immunity from prosecution to those authorized in drug research. Since this portion of Mississippi's law is taken directly from the Act of the Commissioners on Uniform State Laws, their Comment on these provisions is noteworthy:

> This Section, setting out the education and research provisions, is designed to make it clear that education and research are an integral part of the total law enforcement effort. Broad language is used in order to provide maximum latitude.[129]

The "broad language" used by the law in the area of education and research should be actively utilized in order to better inform our citizens of the dangers of drug abuse. These two sections of our law can be very effective if they are used to their fullest extent.

IV. CONCLUSION

The Uniform Controlled Substances Act of 1971 is an admirable attempt by the Mississippi Legislature to face the drug problem that challenges every level of society. Even though some of its sections appear ambiguous and inconsistent, it fills a large void by its all-encompassing structure.

Realizing that any drug legislation is not a "this or nothing else" proposition, it is submitted that our court's recent interpretation of the 1971 Act in the *Johnson* decision will evoke much controversy and further legislative action. Adopting a well-reasoned uniform act in 1971 was a wise move on the part of the legislature, but subsequently giving the law a myriad of interpretations is a great disservice to the Act itself and to the people of Mississippi who must live under its provisions.

It is hoped that if a different legislative approach to drug misuse is adopted, it will not be piecemeal like earlier legislation and that it will maintain a thoroughly reasoned, well-designed, and comprehensive approach to the problem. The Uniform Controlled Substances Act of

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[129] 1970 COMMISSIONERS' ACT, Comment on § 508, *supra* note 84 at 261.

1971 can be a firm starting point from which we can effectively meet and defeat drug abuse in Mississippi. As Neil Chayet noted in 1968:

> [Drug abuse] . . . is a great challenge to the law, which must prevent persons from injuring themselves through improper and uncontrolled use, yet must permit and encourage meaningful research. The law accomplishes very little when the only result is to make felons of young people seeking a new thrill. The many challenges can and must be met, and all of us . . . . must work together to meet them.[130]

William C. Trotter, III
William M. Chaffin

Appendix I

*Effects of Commonly Misused Drugs**

Heroin and morphine are true narcotic analgesics in the sense that their use produces a marked indifference to pain. In addition, when injected intravenously a warm flushing of the skin and intense pleasurable sensations in the lower abdomen will result. Repeated usage of these drugs in a comparatively short time will result in the development of a tolerance, that is, a state which requires a gradually increasing dosage to permit the drug to attain the effect desired. Both a psychological and compelling physical dependence result from the use of "hard narcotics." The physical dependence develops in intensity with continued use and requires the continued administration of the drug to avoid withdrawal symptoms. It appears that the subjective action of the morphine-type drugs also involve changes in mood, an inability to concentrate and the development of apathy. Physical degeneration occurs, arising from drug preoccupation, personal neglect, malnutrition and susceptibility to infections. Overdosage can cause death through excessive respiratory depression.

Early withdrawal symptoms include lacrimation, nasal discharge, yawning and perspiration. Later, dilated pupils, loss of appetite, gooseflesh, (thus, the expression "cold turkey") restlessness and increased irritability and tremor will appear. At its peak intensity, the syndrome includes high irritability, insomnia, violent yawning, severe sneezing and lacrimation. Nausea and vomiting are common, as are intestinal spasms and diarrhea. Increased heart beat and elevated blood pressure, as well as muscular spasms, abdominal cramps and pains in the bones and

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[130]Chayet, *supra* note 7, at 22.

*Illinois v. McCabe, 275 N.E. 2d 407, 410-12 (Ill. 1971).

muscles of the back are common. Death due to cardiovascular collapse can result from withdrawal. The symptoms are caused by the drug-induced alterations at the cellular level, most prominently in the central nervous system. Most authorities consider that the drug addict's frequent involvement in criminal activity results from his acute need for the drug rather than because of the action of the drug itself. The term addiction refers to the physical, rather than a psychological dependence on the drug.

Cocaine . . . is a powerful stimulant, whereas the morphine-type drugs have a depressing action. Too, cocaine is further unlike the opiates in that it does not have effects of tolerance or physical dependence and abstention does not cause acute withdrawal symptoms. However, because of its potent nature, it induces intense physical and mental excitation and a marked reduction in normal inhibitions which often results in aggressive and even violent behavior. Intense hallucinations and paranoid delusions are common and, because of this, cocaine users frequently attempt to dilute the experience with a depressant such as heroin or morphine.

The properties and consequences of the use of marijuana differ from those attending the use of opiates or cocaine. The acute physical symptoms of marijuana use typically induced are an increase in pulse rate, a slight elevation in blood pressure, conjunctival vascular congestion, a rise in blood sugar, urinary frequency and dryness of the mouth and throat. Nausea, vomiting and occasional diarrhea have been observed, as has the inability to coordinate voluntary muscular movements. There is usually a marked increase in appetite. Deaths due to overdose apparently have not been reported.

The mental or subjective effects of the administration of this drug are variable and depend on the interaction of several factors including the physical and pharmacological properties of the particular marijuana used, the amount of dosage, and more importantly, what has been called the character structure of the user, (including his experience with the drug, his attitude and expectations) and the social setting or environment in which the drug is used. The most common reaction is the development of a euphoric state of altered consciousness in which ideas seem disconnected, uncontrollable and freely flowing. Time perception is distorted with minutes seeming like hours. Spatial conception may also be disturbed. Vivid hallucinations, usually, but not always, pleasant, can occur with increased dosage. There may be marked alterations of mood, usually manifested by an extreme feeling of well being which is often accompanied by uncontrollable laughter. Later a more somber

or depressed mood will appear. The drug's influence can cause anxiety, confusion or disorientation, and with larger doses temporary psychotic episodes have been observed in predisposed individuals. Inhibitions are reduced but violent or otherwise aggressive behavior seems to be rare.

Almost all authorities agree that marijuana is not a narcotic or addictive in the sense that the terms are precisely used. Unlike the opiate drugs, it does not produce a physical dependence, and upon abstention there are no withdrawal symptoms. A tolerance to the drug does not develop. Marijuana use does, however, lead to a mild psychological dependence. The short-hand descriptive phrase most often applied to the drug is "mild hallucinogen," although this refers to only one of its many effects.

. . . Frequent use of the barbiturates at high dosage levels leads invariably to the development of physical dependence, tolerance and severe withdrawal symptoms, similar to those associated with heroin use. The effects of barbiturate intoxication resemble those of alcoholic intoxication. There is a general sluggishness, difficulty in concentrating and thinking, speech impairment, memory lapse, faulty judgment and exaggeration of basic personality traits. Irritability and quarrelsomeness are common. Hostile and paranoid ideas as well as suicidal tendencies can occur. Barbiturates are said to be the most frequently used chemical in suicides in the United States. Accidental death from an overdose also can occur. There is a clear association between barbituric intoxication and accidents and traffic fatalities. The drug can depress a wide range of functions, including the nerves, skeletal muscles and the cardiac muscle. Barbiturates are frequently used by heroin addicts to boost the effect of weak heroin.

The consensus of the amphetamines (stimulants) is that, unlike the barbiturates, their abuse does not lead to a physical dependence, but the development of a high tolerance and strong psychological dependence are common. Occasional dosage under medical supervision causes only an elevation in mood and a state of well-being. Long term dependence however, leads to serious mental and physical problems. Malnutrition and debilitation due to self-neglect will appear. A well known complication of amphetamine abuse is paranoid schizophrenia. The user may react violently to his persecutive delusions. Visual and auditory hallucinations occur and can persist long after use is discontinued. Although true withdrawal symptoms do not occur, the latter stages of excitement and mental disarrangement are difficult to endure. To take the edge off this tense euphoria, the user will sometimes turn to barbiturates or the opiates.

Special mention should be made of one particular amphetamine, metamphetamine, commonly called "speed." Its effects are generally the same as other amphetamines, only markedly intensified. There is evidence that large doses result in permanent brain damage. The drug's lethal qualities are well documented. The potential for violence, paranoia and physical depletion are substantially more severe.

. . . LSD is the best known and one of the highly potent [hallucinogens or "psychedelics"]. Less potent hallucinogens include psilocybin, peyote, and mescaline and hashish (another derivative of the plant from which marijuana comes). As with marijuana usage, a true physical addiction does not occur with LSD, in that withdrawal effects do not follow abstinence. Frequent use of LSD will lead rapidly, however, to the development of a high tolerance. Psychological dependence develops as it does with exposure to almost any substance which alters the state of consciousness. During LSD-intoxication severe panic and paranoid reactions are encountered. Attempts at suicide as well as uncontrolled aggression are among the dangers to the intoxicant. Hallucinations are common, accompanied by feelings of grandiosity and omnipotence. Recurrences of the LSD experience weeks or months after the last drug intake are well known. Various emotional disorders have been observed following exposure to LSD. A chronic anxiety state is the most common. Prolonged psychotic reactions also have been identified with LSD. Too, there is also growing evidence that LSD can cause chromosomal damage.

APPENDIX II

On May 19, 1972, the Mississippi Legislature amended the Uniform Controlled Substances Act. The main thrust of the amendment was to change the penalty section of the 1971 Act and to reorganize the drug enforcement authority.

The Mississippi Bureau of Drug Enforcement was designated the Mississippi Bureau of Narcotics, transferred to the Department of Public Safety, and the agent strength of the Bureau was increased from twenty-four to fifty.

The amendment greatly stiffened the penalties for possession with intent to manufacture or deliver and for the selling or "pushing" of controlled substances. For example, the penalty for selling the hard narcotics of Schedules I and II was increased to a possible thirty (30) years or a $30,000.00 fine, or both. The penalties for mere possession were redefined, and marijuana was placed in a separate category. Possession of less than an ounce of marijuana is now punishable by not more

than one (1) year in the county jail or a $1,000.00 fine, or both. With possession of over an ounce, one could spend three (3) years in the State Penitentiary.

Individual judges are still empowered to suspend the sentences of first offenders, and an offender under age twenty-six (26) may apply to have the official records expunged of his offense. First offenders under twenty-one (21) shall be confined in a hospital, and any one convicted of a drug offense who is found to be dependent upon or addicted to a controlled substance may receive medical treatment for his condition.

PRIVATE REMEDIES FOR BEACH-FRONT PROPERTY DAMAGE CAUSED BY OIL POLLUTION OF MISSISSIPPI COASTAL WATERS

I. The Problem

> [T]he technology of oil — its extraction, its transport, its refinery and use — has outpaced laws to control that technology and prevent oil from polluting the environment. In short, oil is largely out of legal control. It is out of legal control in the United States and around the world.[1]

Over one million tons of petroleum products move up and down the coastal and inland waters of the United States every day.[2] Such a large volume of oil passing in commerce makes it inevitable that some of it will find its way from the confines of vessels into the navigable waters of the United States. Upon contact with water, oil forms an emulsion, giving the water a "sheen." As little as fifty gallons of oil per square mile are sufficient to create a "sheen" which, if untreated, can cause substantial damage to waterfowl, shellfish, aquatic biota, boats, piers, and beaches.[3]

The greatest danger of oil pollution does not come from huge oil tanker wrecks and collisions. Such incidents are relatively rare,[4] and the likelihood of their occurring off the Mississippi coast appears remote.[5] Of much greater impact are the countless number of "small oil spills" created by ocean going vessels through human negligence, cleaning of salt water ballasts, dumping, pumping bilge waters, cleaning oil tanks, and transferring and handling oil cargos.[6] These "small oil spills" have the "most serious and long term effects on the environment."[7] Over two

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[1]Edwards, *Oil Pollution and the Law,* Oil Pollution Problems and Policies 21 (S. Degler ed. 1969) [hereinafter cited as Edwards].

[2]*Id.* at 24.

[3]Biglane & Wyer, *Oil Pollution Control Legislation and the Water Quality Improvement Act of 1970, the Federal Viewpoint,* in Proceedings of the Joint Conference on Prevention and Control of Oil Spills 11, 13 (1971).

[4]Edwards, *supra* note 1, at 23, states: "In 1966, only six tankers were actually sunk at sea. This amounts to less than 0.1 percent of the tankers in operation."

[5]Edwards, *supra* note 1. For a discussion of some of the major oil spills *see* Lohne, *Oil Pollution of Coastal and Inland Waters of the United States Under the Water Quality Improvement Act of 1970,* 38 Ins. Counsel J. 49 (1971); Shutler, *Pollution of the Sea by Oil,* 7 Houston L. Rev. 415 (1970); Sweeney, *Oil Pollution of the Oceans,* 37 Fordham L. J. 155 (1968).

[6]Edwards, *supra* note 1, at 23.

[7]Biglane & Wyer, *supra* note 3, at 12.

thousand of these "small oil spills" were estimated to have occurred on the navigable waters of the United States in 1966.[8]

As a coastal state Mississippi is subject to pollution from these "small oil spills," the large number of which pose a problem to public and private property in Mississippi that is far from academic. This paper will be limited to a discussion of the remedies a Mississippi citizen owning beach-front property along the Gulf Coast may have for pollution damage to his land caused by the discharge of oil from sea-going vessels. Oil pollution from off-shore drilling rigs is discussed only to the extent that it relates to the overall theme of this paper.[9] This paper does not attempt to cover oil spills on navigable watercourses within Mississippi, although many of the principles discussed herein will be applicable to such a situation.

II. Mississippi Statutory Pollution Law

When oil pollution strikes the beach-front property owner, it costs him money.[10] If he lives on the beach, oil on his land, boats, and piers will have an obvious effect on his use and enjoyment of the property.[11] Somehow, he has to (1) get the oil off his property and (2) seek legal action to restore his beach to its former condition. The owners of commercial establishments such as hotels and restaurants which front on the beach suffer damage to the appearance of their property from oil-blackened beaches plus monetary loss from a decline in the tourist industry.[12] They will want removal of the oil and restoration of their beaches to their former conditions to make their location again attractive to tourists.[13] An examination of current Mississippi laws on pollution may offer some guidance in the handling of a pollution case for a private citizen whose beach-front property has been covered by oil.

A. The Mississippi Air and Water Pollution Control Act of 1966

(1) General Provisions

In 1965 the Federal Water Quality Act, which required the states to be the leaders in water pollution control,[14] was passed. Under its

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[8]Edwards, *supra* note 1, at 24 .

[9]43 U.S.C. §§ 1331 *et. seq.* (1971) .

[10]Shutler, *Pollution of the Sea by Oil, supra* note 5, at 418.

[11]*Id.*

[12]*Id.*

[13]*Id.*

[14]33 U.S.C. §§ 1151 *et. seq.* (1971) .

provisions, each state had to establish specific water quality standards and comply with other general requirements.[15] In order to carry out the purposes of this federal act, in 1966 the Mississippi Legislature passed the Mississippi Air and Water Pollution Control Act.[16] This Act defines pollution as

> [S]uch contamination, or other alteration of the physical, chemical or biological properties of any waters of the State, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the State as will, or is likely to, create a nuisance or render such waters harmful, detrimental or injurous to public health, safety or welfare. . . .[17]

To state the obvious, oil spilled upon coastal waters will come within the Mississippi definition of pollution. The Act specifically states that it covers pollution of the coastal zone by defining "waters of the state" to include "all waters within the jurisdiction of this State, including . . . such coastal waters as are within the jurisdiction of the State."[18] It is declared unlawful for any person to pollute Mississippi waters directly or to place a potential pollutant in such a position as is likely to cause pollution of Mississippi waters.[19] Discharges of wastes which reduce water quality standards are further prohibited.[20] The pollution or reduction in water quality levels of the waters of the state of Mississippi is declared to be a public nuisance.[21]

The enforcement arm under this Act is the Mississippi Air and Water Pollution Control Commission.[22] Violations of the terms of this Act or regulations and orders published under it, are "brought to the attention of the Commission by private citizens, legislators, sportsmen, game and fish wardens, conservation groups, college students, and, of course, by

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[15] *Id.*

[16] MISS. CODE ANN. §§ 7106-111 *et. seq.* (Supp. 1971).

[17] *Id.* § 7106-112 (a).

[18] *Id.* § 7106-112 (f).

[19] *Id.* § 7106-118 (b).

[20] *Id.*

[21] *Id.*

[22] *Id.* § 7106-113 (a). Members of the commission include: The Director of the Division of Sanitary Engineering of the State Board of Health, Director of the State Game and Fish Commission, the Water Engineer of the State Board of Water Commissioners, the Supervisor of the State Oil and Gas Board, the Director of the State Plant Board, the Executive Secretary of the State Marine Conservation Commission, and four other members to be appointed by the Governor with the advice and consent of the Senate.

staff members in the normal course of their work."[23] Once an alleged violation has been reported to the commission, it may cause a written complaint and order to be served upon the alleged violator. Such complaint shall specify the provision or regulation violated, the facts supporting such violation, and shall order corrective action to be taken within a reasonable time.[24] The person so served has thirty days within which to request a hearing before the Commission.[25] If such hearing is not requested the order becomes final at the end of the thirty day period.[26] Appeals can be taken from any final order of the Commission to the chancery court and from there to the Mississippi Supreme Court.[27]

The Act provided for civil and criminal penalties for violations of its terms.[28] Violation of any regulation or order of the Commission subjects one to prosecution for a misdemeanor with punishment being from fifty dollars to three thousand dollars plus cost of prosecution and/or imprisonment in the county jail not to exceed one year.[29] Additionally, when the defendant violates the terms of this Act and kills fish or wildlife, he is liable to the state in an amount equal to the sum of money necessary to restore such fish or wildlife.[30] This money is recovered by the Commission, acting for the state in a civil action in a circuit court of proper venue.[31]

It is unfortunate that the Act, although certainly much needed and very useful in the broad legal sense, will not materially aid the private landowner whose beaches are covered with oil. No provisions for clean-up of pollution appears in the Act, nor is there any statement of liability for cleanup. The Act creates no new legal rights for the private landowner through which he can seek cleanup costs or damages for oil pollution. The legal remedies are given to the state, declaring that pollution of the waters of Mississippi constitutes a "public nuisance."[32] Traditionally, public nuisances are abatable only through the action of

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[23]Address by C. Andre, Mississippi Oil and Gas Law Seminar, Jackson, Mississippi, April 2, 1971.

[24]MISS. CODE ANN. § 7106-120 (a) (Supp. 1971).

[25]*Id.*

[26]*Id.*

[27]*Id.* § 7106-128.

[28]*Id.* § 7106-127 (a).

[29]*Id.*

[30]*Id.* § 7106-127 (b).

[31]*Id.*

[32]*Id.* § 7106-118 (b).

elected representatives of the people, not by action of private individuals.[33] The criminal penalities are payable to the state,[34] and the only civil remedy authorized by the Act is one by which the state may recoup its losses incurred in restocking the wildlife lost through pollution.[35]

B. The State Oil and Gas Board

The State Oil and Gas Board has the responsibility of supervising all facets of the oil industry in Mississippi.[36] This includes limited power over oil pollution. The Act provides that the Board shall have the power, "to prevent the pollution of fresh water supplies by oil, gas, or salt water, and generally to prevent waste. . . ."[37]

It is obvious that this Act will not help the coastal landowner in his search for cleanup costs and damages. The Act applies only to pollution of "fresh water" by oil.[38] Moreover, it should also be noted that the Board is primarily concerned with the exploration, development and conservation of the oil and gas resources of the State of Mississippi.[39] The Board has no jurisdiction over vessels, but is limited solely to the oil producing industry.[40]

C. Other State Agencies

An examination of statutes concerning the pollution control jurisdiction of other existing state agencies[41] leaves the landowner in the same position. This writer has found no Mississippi act that gives a landowner the right to sue for cleanup or oil damage to his beachfront property.

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[33]W. PROSSER, LAW OF TORTS § 86 at 573 (4th ed. 1971) [hereinafter cited as PROSSER].

[34]MISS. CODE ANN. § 7106-127 (a) (Supp. 1971).

[35]*Id.* § 7106-127 (b).

[36]*Id.* §§ 6132-01 *et seq.*

[37]*Id.* § 6132-10 (c) (1).

[38]*Id.*

[39]*Id.* § 6132-10.

[40]*Id.*

[41]*See* Mississippi Mineral Lease Commission, MISS. CODE ANN. § 5947 (1956); Mississippi Park System, MISS. CODE ANN. § 5957-07 (Supp. 1971); Mississippi Game and Fish Commission, MISS. CODE ANN. § 5841 (1956); Marine Conservation Commission, MISS. CODE ANN. § 6047-04 (Supp. 1971); Marine Resources Council, MISS. CODE ANN. § 8946-151 (Supp. 1971); State Land Commissioner, MISS. CODE ANN. § 4070 (1956).

D. Conclusions - State Statutes

The major pollution control agency in Mississippi is the Air and Water Pollution Control Commission.[42] It has been suggested that because the Air and Water Pollution Control Act is general law, all state agencies are vested with enforcement authority.[43] While this may be a true statement, this writer feels that its powers are of such a general nature that it is of no benefit to the private individual whose beaches are polluted. Moreover, the current procedure of the Air and Water Pollution Control Commission, Enforcement Division, in cases where oil has been spilled onto Mississippi coastal waters, is to call in the United States Coast Guard to take whatever action it deems necessary.[44] This points out the weakness of Mississippi pollution legislation as it relates to beach-front property owners. State pollution statutes will not help him get the oil off his property nor will they give him a remedy for damages.

III. Common Law Actions

Since the owner of oil polluted beaches will not find relief in Mississippi pollution statutes, he must look either to the common law or to federal law. Traditionally, common laws suits for pollution have been brought as actions for trespass, negligence, public nuisance and private nuisance.[45] Pollution actions have also been maintained based upon strict liability,[46] and an admiralty remedy has evolved.[47] It is believed that trespass, negligence, and nuisance actions offer the only real possibility for recovery of damages for vessel oil pollution on private beaches.

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[42]Andre, *supra* note 23.

[43]*Id.*

[44]Telephone interview with Mr. William H. Penn, Jr. of the Mississippi Pollution Control Commission, Enforcement Division at Jackson, Mississippi, March 17, 1972.

[45]Reitze, *Private Remedies for Environmental Wrongs,* 5 Suffolk U. L. Rev. 779, 798 (1971).

[46]Burns, *A Pollution Suit: Lawyer's Guide to Private Law Theory,* 15 Trial Lawyers Guide 191 (1971). In the interest of maintaining this paper at a manageable length, "strict," or "absolute," liability theories will be omitted. For those who would pursue these remedies, an examination of the following may prove enlightening: Avins, *Absolute Liability for Oil Spillage,* 36 Brooklyn L. Rev. 359 (1970); Sweeney, *Oil Pollution of the Oceans,* 37 Fordham L. Rev. 155 (1968); Note, *Private Remedies for Water Pollution,* 70 Colum. L. Rev. 734 (1970).

[47]An examination of the admirality remedy for oil pollution is beyond the scope of this paper. For detailed discussion of this remedy one may refer to the following: McCoy, *Oil Spill and Pollution Control: The Conflict Between State and Maritime Law,* 40 Geo. Wash. L. Rev. 97 (1971); Shutler, *Pollution of the Sea by Oil,* 7 Houston L. Rev. 415 (1970); Sweeney, *supra* note 46.

A. Nature of the landowner's interest

Before examining the common law remedies it will be necessary to examine briefly the general and specific property rights possessed by beach-front property owners. One who owns beach-front property on the Mississippi coast has certain property rights peculiar to land abutting on water.[48] These rights are called littoral or riparian rights,[49] and they possess "the usual attributes and incidents of property."[50] Although the correct term for one owning property on a sea shore is "littoral proprietor," the term "riparian proprietor" has been used interchangeably with it to such an extent that, in most cases, a distinction between the terms is no longer drawn.[51]

The Mississippi Supreme Court has discussed the theory of riparian or littoral rights as follows:

> [O]wners of uplands bordering on submerged lands are riparian or littoral owners. Such owners of the shoreline have a peculiar property right correctly referred to as littoral rights. These rights originate in the juxtaposition of land and water, the enjoyment of the land and the water in connection with the land. *Littoral rights include the rights of navigation, boating, swimming and fishing;* and all these rights depend upon access to the water from the littoral owner's land.[52]

Riparian or littoral rights exist only for those who own beach-front property.[53] As stated earlier, these riparian or littoral rights have all the attributes and incidents of property,[54] so it would follow that any invasion of these property rights would give the landowner grounds to bring a common law action for trespass, negligence or nuisance.

The riparian landowner on the Mississippi coast is given certain rights by statute.[55] He may build boathouses, piers, wharfs, docks, pavillions and other structures on his land.[56] Such structures are his private property and even though they may rest partially on the submerged bottomlands that belong to the public, he is entitled to the exclusive use, possession and occupancy of them.[57] He may abate any public or private

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[48] 56 AM. JUR. *Waters* § 274 (1961).
[49] *Id.*
[50] *Id.*
[51] *Id.* § 273.
[52] Harrison County v. Guice, 244 Miss. 95, 106-07, 140 So. 2d 838, 842 (1962).
[53] 56 AM. JUR. *Waters* § 283 (1961).
[54] *Id.* § 274.
[55] MISS. CODE ANN. § 6047-10 (Supp. 1971).
[56] *Id.*
[57] *Id.*

nuisance committed by anyone in the area of his riparian ownership, and may further "resort to any remedial action authorized by law."[58]

B. Action for trespass

At common law, every unauthorized entry upon the lands of another constituted a trespass, and entitled the landowner to damages.[59] Liability for trespass was, in effect, a form of strict liability.[60] However, the theory of trespass has been modified to the extent that one is liable for a trespass only in cases of intentional intrusions, negligence, or in the carrying out of an abnormally dangerous activity.[61] The trespass action is used to protect one's exclusive possession of land in its "intact physical condition."[62]

Oil which washes onto the beaches of the landowner will constitute a trespass, and the landowner will be entitled to damages for it.[63] Such damages could include recovery for aesthetic loss as well as actual damage to the land.[64] The landowner will be entitled to nominal damages for every trespass in Mississippi,[65] but in order to recover more than nominal damages, actual damages must be shown.[66]

A proper determination of damages for an oil trespass must include findings that the oil pollution either permanently or temporarily damaged the land. The prevailing view is that oil polluted beaches are temporarily, not permanently, damaged.[67]

Under current Mississippi law, if the beach were held to be temporarily damaged by oil, then the measure of damages would be the cost of restoration of the property to its former condition plus compensation for loss of its use.[68] If the court found that the oil polluted beaches were permanently damaged, then the amount of damage would

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[58]*Id.*

[59]PROSSER, *supra* note 33, § 13.

[60]*Id.*

[61]*Id.*

[62]*Id.* § 13 at 68.

[63]*Id.* at 69; "Any physical entry upon the surface of the land is a trespass, whether it be by walking upon it, flooding it with water, casting objects upon it, or otherwise."

[64]Burns, *supra* note 46, at 200.

[65]Keirn v. Warfield, 60 Miss. 799 (1883).

[66]Clark v. Hart, 3 So. 33 (Miss. 1887).

[67]Lohne, *supra* note 5, at 61 & n.110.

[68]Chevron Oil Co. v. Snellgrove, 175 So. 2d 471 (Miss. 1965).

be the difference in the market value of the property before and after damage.[69]

A trespass action offers the injured landowner a good possibility for recovery, but in many cases the defendant will be able to defeat that action by showing that the escape of oil was purely involuntary, involving no element of intent or negligence on his part.[70]

C. Action for Negligence

Recovery for the tort of negligence is a relatively new idea when compared with remedies such as trespass or nuisance.[71] Around 1825, negligence became recognized as a separate and independent basis of tort liability.[72]

It should be noted that negligence may constitute grounds for a trespass action, and the result of a negligent act may give one a right to sue for a nuisance, but in the context of the present discussion, negligence is dealt with as a separate, independent basis of tort liability.[73]

The traditional elements that must exist before tort liability for negligence will lie are: (a) a duty recognized by law which requires one to "conform to a certain standard of conduct for the protection of others against unreasonable risks," (b) a breach of that duty, (c) proximate cause, otherwise known as the causal connection between conduct and a resulting injury, and (d) damage or loss resulting to another.[74]

In order for the injured property owner to recover damages under negligence for oil pollution to his property he must prove the above four elements of the tort.[75] The plaintiff would have to show that the defendant had knowledge or should have had knowledge that his activity would cause harm to the plaintiff, and more importantly, that the defendant failed to take the steps a reasonable man would have taken to avoid injury to the plaintiff.[76]

The tort of negligence is considered by some writers to be the best legal theory available to a landowner in an oil pollution suit.[77] How-

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[69]*See e.g.,* Waggener v. Leggett, 246 Miss. 505, 150 So. 2d 529 (1963).

[70]Burns, *supra* note 64, at 200.

[71]PROSSER, *supra* note 33, § 28.

[72]*Id.* at 143.

[73]*Id.*

[74]*Id.* § 30 at 146.

[75]*See, e.g.,* Clark v. Gilmore 213 Miss. 590, 57 So. 2d 328 (1952).

[76]Burns, *supra* note 64, at 200.

[77]Shutler, *supra* note 10, at 415; Comment, *Oil and Oysters Don't Mix: Private Remedies for Pollution Damage to Shellfish,* 23 ALABAMA L. REV. 100 (1970).

ever, there exists one major roadblock to recovery for the tort of negligence. The proof of causal connection is next to impossible.[78] As is the case with trespass and nuisance, the landowner must prove not only that oil has covered his beach-front property, but also that the same oil came from Ship X.[79] This requirement of proof defeats most negligence tort actions brought for oil pollution of private beaches. The landowner is able to prove that his beaches are covered with oil, but not whose oil it is.[80]

This problem of proving causal connection in negligence torts may be solved within the next few years. Attempts have been made to develop a system for "fingerprinting" oil so that subsequent analysis of oil from a spill could reveal the identity of the polluter.[81] Two such systems, one using radioactive materials and the other using metals or metal-organic compounds have been used, but have not proven satisfactory because they interfered with some stages of processing and use of oil.[82] A new system has been developed called the "Organic Electrophore System" in which organic compounds known as electrophores are used to produce a type of code.[83] This system may prove to be the best ever devised for use in tracing oil. The desirability of putting this system to work has been stated in this manner:

> [T]he Organic Electrophore System offers promise as an active tagging system useful in the enforcement against and prevention of oil spills. The extremely low concentration of relatively stable yet harmless compounds, their easy detection and wide variety for coding purposes point up the desirability of putting such a system into wide-spread use.[84]

If this system, or one similar to it, were put into effect worldwide, the problem of proving causal connection would disappear, and an action based on negligence tort would offer one of the best methods of recovery to be found in the oil pollution area.

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[78]Shutler, *supra* note 10, at 437, 438.

[79]Comment, *Oil and Oysters Don't Mix: Private Remedies for Pollution Damage to Shellfish, supra* note 77, at 104.

[80]Sweeney, *supra* note 5, at 173.

[81]R. Landowne and R. Wainright, *A Chemical Tagging System for Use in the Prevention of Oil Spills,* PROCEEDINGS OF THE JOINT CONFERENCE ON PREVENTION AND CONTROL OF OIL SPILLS, 179 (1971). This "fingerprinting" involves a process whereby traceable chemical elements are injected into the oil before it is placed aboard tankers, thus providing a means of identification of the oil in case of a spill.

[82]*Id.* at 180.

[83]*Id.*

[84]*Id.* at 182.

D. Action for Nuisance

The term "nuisance" embodies two separate theories of law, private nuisance and public nuisance.[85] A private nuisance is a disturbance or interruption of rights in land that may be remedied through civil action by the landowner whose rights have been disturbed.[86] A public nuisance, on the other hand, is a species of criminal offenses created for interference with certain rights of the community at large. Public nuisances are normally abated only by elected officials.[87]

It is important to note that nuisance is a separate field of tort liability "rather than a type of tortious conduct."[88] It is not concerned with the act or omission which has caused the plaintiff damage, rather it concerns the interests in land that are invaded and the damage or harm done to the land.[89]

> The Supreme Court of Mississippi has defined a nuisance to be:
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> [T]hat class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his improper, indecent, or unlawful personal conduct, working an obstruction or injury to a right of another, or of the public, and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage.[90]

One should also note the distinction between nuisance, trespass and negligence. A trespass is a direct physical invasion of the land, whereas a nuisance is merely an interference with the use and enjoyment of land involving no invasion of the land proper.[91] It is difficult to draw practical distinctions between negligence and nuisance because "negligence is merely one type of conduct which may give rise to a nuisance."[92]

There are three bases upon which liability for a nuisance may be predicated.[93] One may be liable for an intentional interference with the plaintiff's property interest, or a negligent interference, or for an abnormally dangerous activity carried on in an inappropriate place (strict liability).[94]

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[85] PROSSER, *supra* note 33, § 86.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 573.
[89] *Id.*
[90] Young v. Weaver, 202 Miss. 291, 299, 32 So. 2d 202, 205 (1947).
[91] GINDLER, WATER POLLUTION AND QUALITY CONTROLS § 210.3 (1967).
[92] PROSSER, *supra* note 33, § 87 at 574.
[93] *Id.*
[94] *Id.* § 87.

In order to be an actionable nuisance, both public and private nuisance doctrines require a showing of substantial interference with the plaintiff's property rights. Both require the interference to be an unreasonable one in the light of the surrounding circumstances. The standard of substantial interference and/or reasonableness of the interference is measured by the hypothetical "reasonable man" standard.[95]

A littoral landowner whose beaches have been polluted by oil may be able to recover damages under public nuisance theory. As noted, a public nuisance is one that affects the community as a whole rather than individual members of the community. It is normally abatable only by a public official acting for the community.[96]

Where a private landowner can show damages different in kind rather than in degree caused by a public nuisance, he may maintain a private action for such public nuisance.[97]

In Mississippi this theory was stated by our Supreme Court in *Pearman v. Wiggins,* wherein the court said:

> To abate a public nuisance, the public authority must move. A private action, either at law or in equity, will not lie, unless the plaintiff has sustained some special damage. The complainant must sustain a special or peculiar damage—an injury distinct from that done to the public at large.[98]

Any large oil spill from a vessel will cover substantial amounts of public and private beach-front property. Since large amounts of property are involved, the nuisance will take on the character of a public nuisance which means that the injured landowner, in order to maintain a private civil action for the public nuisance, must show injuries different in kind and not merely degree from that suffered by the general public.[99] The landowner will find it difficult to distinguish his damage from that of the public in general, illustrating rather ironically that in nuisance law the more widespread the injury to land from oil pollution, the less likely are the chances for private damages through a nuisance action.[100]

If the landowner is able to show "special or peculiar damage" different from that suffered by the public as a whole, then he will be able

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[95]*Id.*
[96]*Id.* § 86.
[97]*Id.* § 88 at 587.
[98]103 Miss. 4, 12, 60 So. 1, 3 (1912).
[99]Burns, *supra* note 64, at 195.
[100]Burns, *supra* note 64, at 195, 196.

to recover damages for oil pollution to his land through a private action for a public nuisance.[101]

A private nuisance is an interference with the use and enjoyment of an individual's land.[102] It may constitute an interference with the physical condition of the land or it may "consist of a disturbance of the comfort or convenience of the occupant. . . ."[103] Additionally it may affect the health and welfare or peace of mind of the individual occupying the land.[104]

It is possible that small quantities of oil from a vessel might reach the Mississippi coast and pollute only a limited number of beaches. When, and if, this situation occurs, the individual whose beach is polluted will have the right to maintain a private nuisance action for damages. In such an action, the landowner would need to base his case on either negligence, an intentional act, or strict liability for ultrahazardous activity.[105] He would have to prove a substantial interference with the use and enjoyment of his land that was unreasonable under the circumstances.[106] In the oil pollution case where damage is limited to the beaches of a few individuals, an action for private nuisance appears to be the best remedy available to the landowner.

Once the injured landowner has proven the existence of a nuisance, he has three possible remedies available to him. He may seek injunctive relief or damages, or he may abate the nuisance through self-help.[107] Recovery of damages appears to be the only remedy which will be of use to the landowner in an oil pollution suit based on nuisance. Since most vessel oil spills are one time events,[108] injunctive relief will be of no benefit. Abatement by self-help is likewise useless to the injured landowner, where his beach has been polluted by oil from a sea-going vessel.[109]

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[101]Pearman v. Wiggins, 103 Miss. 4, 60 So. 1 (1912).

[102]PROSSER, *supra* note 33, § 86.

[103]PROSSER, *supra* note 33, § 89 at 592. *See also,* Love Petroleum Co. v. Jones, 205 So. 2d 274 (Miss. 1967); Young v. Weaver, 202 Miss. 291, 32 So. 2d 202 (1947); American Sand and Gravel Co. v. Rushing, 183 Miss. 496, 184 So. 60 (1938).

[104]*See* Masonite Corp. v. Burnham, 164 Miss. 840, 146 So. 292 (1933) (health and welfare); May v. Upton, 233 Miss. 447, 102 So. 2d 339 (1958) (peace of mind).

[105]PROSSER, *supra* note 33, § 87.

[106]*Id.*

[107]*Id.* § 90 at 602.

[108]EDWARDS, *supra* note 1. Injunctive relief is tailored for the situation where a continuous nuisance exists.

[109]PROSSER, *supra* note 33, § 90. Abatement by self-help is the theory which allows one to enter the lands of another personally to abate a nuisance when an emergency situation exists.

The amount of damages recoverable for oil pollution on privately owned beaches will depend upon whether the damage is temporary or permanent.[110] If the court finds that oil pollution of a beach permanently diminishes the value of the land, it will award damages equivalent to the diminution of the market value of the property.[111] On the other hand, the court may decide that oil pollution does not permanently injure the beach. In that case, the damages awarded would be equivalent to the diminution in the rental or usable value for the period of pollution.[112]

In addition to actual damage to land, the plaintiff in a suit for nuisance arising out of oil pollution may be allowed to recover all special damages resulting from personal inconvenience and danger to the health of himself and his family.[113]

The theory of recovery for special damages in nuisance cases was succinctly stated by our Supreme Court in *City of Oxford v. Spears,* as follows:

> [T]he landowner is entitled to recover such special damages he may be able to prove. These special or incidental damages are elements of damage separate, distinct, and independent of the depreciation of the value of the property or of the depreciation of the rental or usable value of the property. Included in the category of special or incidental damages are annoyance, discomfort, inconvenience, and sickness. . . . There may be others.[114]
>
> The landowner may also recover any reasonable expenditures he has made because of the existence of the nuisance.[115]

IV. Federal Laws and The Private Litigant

Of major importance in the oil pollution area are the federal statutes passed to deal with water pollution. One who represents a littoral landowner whose beaches have been fouled with oil should examine these statutes carefully in order to ascertain whether they will be useful in any anticipated action. The federal acts that should be examined include, The Rivers and Harbors Act of 1899,[116] The Outer Continental Shelf Lands Act,[117] The Federal Water Pollution Control

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110 *See* Southland Co. v. Aaron, 221 Miss. 59, 72 So. 2d 161 (1954).
111 *See* City of Oxford v. Spears, 228 Miss. 433, 87 So. 2d 914 (1956).
112 *Id.;* Southland Co. v. Aaron, 221 Miss. 59, 72 So. 2d 161 (1954).
113 City of Meridian v. Tingle, 226 Miss. 317, 84 So. 2d 388 (1956).
114 City of Oxford v. Spears, 228 Miss. 433, 439, 87 So. 2d 914, 916.
115 Prosser, *supra* note 33, § 90 at 603.
116 33 U.S.C. §§ 401-413 (1971).
117 43 U.S.C. §§ 1331 *et seq.* (1971).

Act,[118] The Water Quality Improvement Act of 1970,[119] and The National Environment Policy Act of 1969.[120]

These acts present one with a veritable maze of agencies, departments and authorities with which he may be required to deal. To name a few, one might be required to talk with representatives of the Water Quality Office of the Environmental Protection Agency; the Corps of Engineers, Department of the Army; the United States Coast Guard, Department of Transportation; the Fish and Wildlife Service, Department of the Interior; the United States Geological Survey, Department of the Interior, and state and local pollution control boards.[121]

A. The Rivers and Harbors Act of 1899

Section 13[122] of the Rivers and Harbors Act of 1899 is called the Refuse Act of 1899. It was designed to prevent obstructions of navigation but has been used with increased frequency as a key tool in the fight against oil pollution.[123]

The Act prohibits the discharge of any refuse matter from or out of any ship, barge, or other floating craft, or from shore, wharf, manufacturing establishment or mill, into the navigable waters of the United States. Excepted from the terms of the act is refuse flowing from streets and sewers and passing therefrom in a liquid state into navigable waters of the United States. In addition to the prohibitions against direct discharge of refuse into navigable waters, it also prohibits the placing of refuse on the banks of navigable streams or waters where it could possibly be washed into the navigable waters of the United States.[124]

Violations of the Refuse Act are treated as misdemeanors carrying a fine of from $500.00 to $2,500.00 and/or imprisonment for up to one year.[125] There is a provision in the Act whereby one who gives information leading to a conviction may recover one-half of any fine levied by

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[118]33 U.S.C. § 1151 (1971).

[119]*Id.* § 1161, *amending* 33 U.S.C. § 1151 (1964).

[120]42 U.S.C. § 4321 (1971). This Act was passed by Congress in 1969 to insure that the federal government balances short term benefits against long term detriments in any government project affecting the environment. For a discussion of this Act *see,* Burns, *supra* note 64, at 191-92; Retize, *supra* note 45, at 814.

[121]Keener, *Federal Water Pollution Legislation and Regulations with Particular Reference to the Oil Industry,* 4 NATURAL RESOURCES L. 484, 485 (1971).

[122]33 U.S.C. § 407 (1971).

[123]Tell, *Summary of Laws and Regulations Governing Spills and Discharges of Oil,* PROCEEDINGS OF JOINT CONFERENCE ON PREVENTION AND CONTROL OF OIL SPILLS, 3, 5 (1971).

[124]33 U.S.C. § 407 (1971).

[125]*Id.* § 411.

the court.[126] There is no requirement to show intent or scienter on the part of the defendant under this Act,[127] and the Refuse Act will be construed liberally even though it is a criminal statute.[128]

Some other general observations about the Refuse Act may be made as follows: (1) "Refuse" has been extended by case law to mean commercially valuable oil or gasoline if it is found upon the Navigable Waters of the United States.[129] (2) Injunctive relief in a civil action is available for use by the federal government under the Refuse Act whereas it would not be available under the Water Quality Improvement Act of 1970.[130]

It is doubtful that this Act will be of value to the attorney looking for a remedy for his client whose beaches, boats, docks and other property have been polluted by oil. The Act is criminal in nature, giving only to the United States Government the civil remedy of injunction in an appropriate case.[131] It is possible for the landowner to recover one-half of the fine levied if he furnishes the information which results in a conviction of the polluter, but the likelihood of his ever possessing such information appears remote.[132]

B. The Outer Continental Shelf Lands Act

Although this paper is limited primarily to the remedies a private landowner may have for oil pollution caused by vessels, it will be necessary to examine the Outer Continental Shelf Lands Act[133] in order to obtain a broad spectrum view of the oil pollution field. This Act, along with Department of the Interior regulations promulgated pursuant to it, deals with oil exploration of the contiguous zone.[134] It may be that oil which washes onto Mississippi beaches comes from an off-shore oil rig instead of a tanker. If so, then that landowner is in a much better position than one whose property is injured by vessel oil pollution. Why? Simply because the recent catastrophic California and Louisiana

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[126]*Id.*

[127]KEENER, *supra* note 121, at 500; United States v. Interlake Steel Corp., 297 F. Supp. 912 (N.D. Ill. 1969).

[128]United States v. Republic Steel Corp., 362 U. S. 482 (1960).

[129]United States v. Standard Oil Co., 384 U. S. 224 (1966).

[130]Tell, *supra* note 123, at 5.

[131]United States v. Republic Steel Corp., 286 F.2d 875 (6th Cir. 1961).

[132]*See* Comment, *The Refuse Act of 1899: Its Scope and Role in Control of Water Pollution,* 58 CALIF. L. REV. 1444, 1459-65 (1970), wherein the author discusses two highly tenous methods of recovery under this statute — a *qui tam* action, and a tort action.

[133]43 U.S.C. § 1331 (1971).

[134]The contiguous zone is "the area seaward from the boundary of state ownership to the 12 mile limit." Tell, *supra* note 123, at 5.

oil spills have caused drastic changes in Department of the Interior Regulations in the area of cleanup.

One writer has explained the new regulations as follows:

> On February 17, 1969, the Secretary promulgated further regulations setting forth in greater detail the responsibility of lessees for the cost of cleanup and for damages from oil pollution resulting from operations under the act. The new regulations, written after the Santa Barbara incident of January 28, 1969, require the operator of the lease to clean up the pollutant, however occurring, and upon his failure to do so, the federal, state or local Governments may, at the expense of the lessee. This is liability without fault, and without limitation as to the amount of such liability.[135]

The regulations promulgated by the Secretary of the Interior will be of great benefit in a pollution suit for oil damage to private property. Section 250.43 (b) provides in part: "If the waters of the sea are polluted by the drilling or production operations conducted by or on behalf of the lessee, and such pollution damages or threatens to damage aquatic life, wildlife, or public or private property, the control and total removal of the pollutant, wheresoever found, proximately resulting therefrom shall be at the expense of the lessee."[136]

Additionally, the new regulations specifically preserve existing remedies that may be found under state law. At § 250.43 (c) the regulations state, "The lessee's liability to third parties, other than for cleaning up the pollutant in accordance with paragraph (b) of this section shall be governed by applicable law."[137] Thus the private landowner whose land is polluted by oil from an off-shore well within the jurisdiction of the Outer Continental Shelf Lands Act may hold the lessee strictly liable for all cleanup costs and, at the same time sue for damages under the common law remedies discussed earlier.

C. The Federal Water Pollution Control Act

The Federal Water Pollution Control Act was passed by Congress to give uniform control over all forms of pollution. It has been amended at various times, including major revisions in 1965[138] and 1970.[139]

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[135]Lohne, *supra* note 67, at 60.

[136]30 C.F.R. § 250.43 (b) (1971).

[137]*Id.* § 250.43 (c).

[138]In 1965, the Water Quality Act was added to this title. It required each state to establish its own water quality standards subject to federal approval. Under it, the states were given the primary responsibility for controlling pollution of water; 33 U.S.C. §§ 1151 *et seq.* (1971).

[139]Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161 *et seq.* (1971); dealing specifically with pollution of the seas by oil.

The declared purpose of Congress in passing this Act was, "to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution."[140]

In passing the Water Quality Act of 1965, amending the Federal Water Pollution Control Act, the Congress, however, instead of establishing a national policy of uniformity in the pollution area, gave to the states the primary responsibility in preventing and controlling water pollution.[141] Each state was required to establish water quality standards of such nature as to protect the public health or welfare.[142] It is readily apparent that such standards will be general in nature, and will be unlikely to apply to specific substances such as oil.[143]

The deficiencies of this 1965 amendment in the oil pollution area have been pointed out as follows:

> In addition to the absence of precise standards, federal enforcement is limited to situations where the discharge has caused a reduction in the quality of the receiving waters below the standards set for that water body, or has polluted the waters to the extent that it endangers the public health or welfare. In the latter case, extended conference and hearing procedures must be complied with before a lawsuit to abate the violation can be commenced.[144]

It should further be noted that although the establishment of water quality standards and their enforcement is a very effective way of preventing pollution of a continuing nature, it will not prove satisfactory for single isolated acts of pollution. The period of time allowed between violation and abatement is too long to be of use in the isolated pollution case where remedial action must be taken swiftly.[145]

D. The Water Quality Improvement Act of 1970

In 1970 Congress declared that oil had such a potential to pollute the waters of the United States that is should be regulated by specific legislation. Thus, the Water Quality Improvement Act of 1970[146] was passed, amending the Federal Water Pollution Control Act[147] in so far

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[140]33 U.S.C. § 1151 (a) (1971).
[141]*Id.* § 1151 (b).
[142]*Id.* § 1160 (c) (3).
[143]Tell, *supra* note 123, at 4.
[144]*Id.*
[145]Edwards, *supra* note 1, at 24.
[146]33 U.S.C. § 1161 (1971).
[147]*Id.* §§ 1151 *et seq.*

as pollution by oil was concerned. This Act is by far the most stringent ever passed by Congress to deal with pollution by a single substance.

A detailed analysis of this Act is beyond the scope of this paper,[148] but several of its important provisions should be noted. It reiterates Congress' determination "that there should be no discharges of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone."[149]

"Harmful quantities" of discharged oil under the Act have been defined by the Secretary of the Interior to mean that amount of oil which when discharged will (a) violate applicable water quality standards or (b) cause a film or sheen upon or discoloration of the water surface or adjoining shorelines, or cause sludge deposits under the water or upon adjacent shorelines.[150]

The Act makes provisions for a National Contingency Plan for the cleanup and removal of discharged oil.[151] In the event of marine disasters which create a substantial threat of pollution by oil, the United States, under this Act, can remove or eliminate the potential pollution hazard; even to the extent of destroying ships and other marine craft.[152]

The major provision[153] of the Act relates to the cleanup of oil pollution. Under section (f) of this act, the owner or operator of a vessel, onshore facility, or offshore facility is *strictly liable* for the clean up costs incurred by the United States Government, unless he can show that he comes under one of the four stated exceptions found in the act. Only if such owner or operator can show that the discharge of oil was solely caused by (1) an act of God (2) an act of war (3) negligence on the part of the United States Government or (4) an act or omission of a third party, or any combination of the above, may he absolve himself from liability to the United States Government for cleanup costs.[154] In the case of an offending vessel, liability for cleanup is to be in an amount not to exceed $100 per gross ton of such vessel or $14,000,000, whichever is lesser.[155]

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[148]This Act has been examined in depth by the following: Lohne, *supra* note 5. Keener, *supra* note 121.

[149]33 U.S.C. § 1161 (b) (1) (1971).

[150]*Id.* § 1161 (b) (3). This section authorizes the President to determine what constitutes "harmful discharges." This was delegated to the Secretary of Interior, who published regulations concerning such "harmful discharges" at 35 Fed. Reg. 14307 (1971).

[151]33 U.S.C. § 1161 (c) (1971).

[152]*Id.* § 1161 (d).

[153]*Id.* § 1161 (f).

[154]*Id.*

[155]*Id.*

While the Water Quality Improvement Act of 1970 does not give to the private landowner any additional remedies, it provides such strong cleanup penalties for violations, it may serve as a deterrent to oil pollution. Additionally, the cleanup provisions will probably benefit the private landowner as well as the publicly owned beaches because in its cleanup operations the federal government will, in most instances, clean up all oil polluted beaches without regard to whether the land is publicly or privately owned.[156]

The Act does not modify any existing liability for oil discharge, removal or damages which the private property owner might have either by state statute or by common law.[157] It is apparent, therefore, in regard to damage to privately owned beach front property by oil pollution, that the prior discussion of the remedies of trespass, nuisance and negligence will be applicable at this juncture.

V. Proposed State Law

The inability of Mississippi pollution laws to cope with oil spills has been noted earlier.[158] We have no State law adequately regulating cleanup or liability for damage in coastal oil spill cases; consequently we turn the matter over to the United States Coast Guard.[159]

It is submitted that the present state of Federal law, while adequately protecting the national interest in the oil pollution field, is inadequate in that it gives no statutory rghts to an injured landowner to sue for oil pollution damage to his land. The inadequacies in federal law have been remedied in at least four coastal states. These states, Florida, Maine, Massachusetts and Washington have passed legislation complementing and supplementing Federal law.[160] These acts fill in the gaps left by federal law, including provisions specifically providing for recovery of damages by landowners whose beaches have been polluted by oil.

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[156]Lohne, *supra* note 67, at 61.

[157]33 U.S.C. § 1161 (o) (1) (1971) states: "Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any on-shore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil." *Id.*

[158]Penn, *supra* note 44.

[159]*Id.*

[160]Florida Oil Spill Prevention and Pollution Act, Fla. Stat. Ann. § 376.011 *et seq.* (Supp. 1971); Maine Oil Discharge Prevention and Pollution Control Act, 16 Me. Rev. Stat. §§ 541 *et seq.* (1971); Massachusetts Clean Waters Act, Mass. Ann. Laws ch. 21, § 27 (1971); Washington Water Pollution Control Act, Wash. Rev. Code § 90.48 (Supp. 1971).

All four of these acts provide for strict liability, without proof of negligence, for reimbursement to the state of cleanup costs, as well as for damages to third parties and the environment.

The constitutionality of such legislation is presently under attack in suits challenging the Florida and Maine statutes, and enforcement parts of each act have been restrained pending outcome of the suits.[161]

The Legislature should watch carefully the results of this litigation. With the experience of these four states before it, our Legislature should be able to draft a statute that meets federal constitutional requirements while providing the coastal landowner with statutory rights for recovery of oil damage to his land.

VI. Conclusion

Since there have been no major oil spills directly affecting the Mississippi Gulf Coast, one may be lulled into a sense of complacency about the adequacies of existing pollution law. It is only reasonable to assume, however, that the growth in the volume of oil transportation by vessels, along with the increase in the size of such vessels, pose a definite possibility of oil spillage off the Mississippi Gulf Coast, whether in large or small amounts.

From an examination of the federal legislation concerning pollution, one can see that the cleanup problem of oil pollution is disposed of by the Water Quality Improvement Act of 1970 and the Outer Continental Shelf Lands Act.

Recovery of damages by the injured landowner is another matter. Existing state law is inadequate to deal with the problem of damages for coastal oil pollution. Presently, in order to recover damages for oil pollution, one must maintain an action for trespass, nuisance or negligence. Each of these actions has its shortcomings. If one maintains a negligence action he must prove causal connection. In maintaining a trespass action, one must show intentional or negligent acts on the defendant's part in order to recover. If an action is based on nuisance theory, one must prove the existence of a private nuisance rather than a public nuisance, or if he seeks recovery in a private action for a public nuisance, he must show damages different in kind rather than degree. While all three of these actions provide possible means for recovery of damage for oil pollution, nuisance theory appears to be the best insofar as recovery of damages for injury to land. Moreover, under nuisance theory, one may also recover such special damages as he is able to prove.

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[161] Tell, *supra* note 123, at 7.

The common law actions of trespass, negligence and nuisance should be supplemented by a new state law patterned after those of Maine, Massachusetts, Florida, or Washington. Mississippi, like the above mentioned coastal states, should hold oil polluters strictly liable to coastal landowners for damage to their private property rights.

Mike Soper

RECENT DECISIONS

CONSTITUTIONAL LAW—STANDING—ALLEGATIONS OF DIRECT INJURY ARE REQUIRED TO ESTABLISH STANDING IN ACCORDANCE WITH THE ADMINISTRATIVE PROCEDURE ACT

Petitioner, a conservation and ecology oriented membership corporation, sought an injunction preventing federal officials from issuing a permit to Walt Disney Enterprises, Inc. for the development of a commercial-recreational facility in the Sequoia National Park. Petitioner Sierra Club relied upon § 10 of the Administrative Procedure Act[1] as the impetus of the action, basing it's allegations of injury on the theory that this constitutes a "public" action concerning the preservation of natural resources; therefore, the principles upon which the club was founded qualified it as a representative of the public. The federal district court in granting the preliminary injunction rejected the respondents' contention that the petitioner lacked standing. On appeal, the Court of Appeals for the Ninth Circuit reversed, holding that the Sierra Club had failed to establish standing and irreparable injury.[2] On writ of certiorari the United States Supreme Court, *held,* affirmed. The Administrative Procedure Act requires that in order to achieve standing for judicial review, allegations of a direct or prospective interest, whether economic or otherwise, be sufficiently established. *Sierra Club v. Morton,* 405 U.S. 727 (1972).

The law surrounding the "standing" of a person to sue, has been developed primarily through judicial decisions rather than by statute.[3] Traditionally, the law of standing has been composed of three elements.[4] A person, to have standing, must show that the constitutional requirement of case or controversy[5] has been satisfied, and he must have sufficient interest in the "case or controversy" to assure an adversary con-

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[1]5 U.S.C. § 702(a) (1970) reads as follows: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

[2]Sierra Club v. Hickle, 433 F.2d 24 (9th Cir. 1970), *cert. granted,* 401 U.S. 907 (1970).

[3]L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 502 (1965).

[4]*See, e.g.,* Associated Industries v. Ickes, 134 F.2d 694, 700 (2d Cir. 1943).

[5]U.S. CONST. art. III, § 2. *See, e.g.,* Tileston v. Ullman, 318 U.S. 44 (1943); Frothingham v. Mellon, 262 U.S. 447 (1923). The "case or controversy" requirement is concerned not only with standing but also with *political questions,* Luther v. Borden, 48 U.S. (7 How.) 1 (1849); *mootness,* California v. San Pablo & T.R.R., 149 U.S. 308 (1893); *ripeness,* Poe v. Ullman, 367 U.S. 497 (1961); *advisory opinions,* Muskrat v. United States, 219 U.S. 346 (1911); and, *the policy against friendly or collusive suits,* Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339 (1892).

text.[6] The party must also have more than a general interest in the alleged wrong[7] and show an invasion of his legal rights or privileges.[8] The reasoning behind these requirements is to insure that only those persons with a genuine and legitimate interest can participate in a proceeding. Standing, thereby, focuses not upon the issues that the party is seeking to adjudicate, but whether the party qualifies as the proper party to request an adjudication of the particular issue. The doctrine of standing has long been considered one of the most amorphous areas of the law, yet recent decisions have provided more clarity and liberalization.[9] The trend toward liberalizing the requirements for standing began when the Court in *Flast v. Cohen*[10] utilized "injury in fact" as the criteria as opposed to the past requirement of "legal interest." Confusion in the area of administrative law has resulted in an attempt to determine if an assertion of an adverse effect is sufficient to establish standing to attack an alleged illegal administrative action. In an attempt to resolve this question, two views have been advanced.[11] Damage to a legal right is the traditional test for establishing standing.[12] Legal right is a broad term encompassing such areas as property rights, contract rights, statutory rights,[13] and constitutional rights.[14] The other view reflects a more liberal approach and requires only that an "injury in fact" be alleged by the plaintiff notwithstanding whether the injury is to a legal right.[15] It should be noted that the courts, in previous decisions,[16] have granted standing to group or individual plaintiffs under the theory that they were "private attorney generals" suing in the public interest. The court in *Associated Industries v. Ickes*[17] justified this theory on the premise that since Congress can constitutionally authorize a government official to bring a proceeding where a justifiable controversy exists, so may Congress, by statutory enactment, authorize a non-official person to bring suit to prevent an officer from violating his statutory powers, for in such instances, a controversy likewise exists. In the area of environ-

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[6]*See, e.g.,* Baker v. Carr, 369 U.S. 186 (1962). The Court stated:

> "The gist of the question of standing" was whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions." *Id.* at 204.

[7]*See, e.g.,* Massachusetts v. Mellon, 262 U.S. 447 (1923).

[8]*See, e.g.,* Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

[9]Davis, *The Liberalized Law of Standing,* 37 U. CHI. L. REV. 450.

[10]392 U.S. 83 (1968).

[11]JAFFE, *supra* note 3, at 501.

[12]*See, e.g.,* Hardin v. Kentucky Util. Co., 390 U.S. 1, 5-6 (1968); Stark v. Wickard, 321 U.S. 288 (1944); Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939).

[13]Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137-38 (1939).

[14]*See* Flast v. Cohen, 392 U.S. 83 (1968).

[15]*See* FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

[16]*See, e.g.,* Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970), *cert. denied,* 400 U.S. 949 (1970).

[17]134 F.2d 694 (2d Cir. 1943).

mental concern and administrative law, the question of standing has frequently arisen in recent years. Although a rapidly developing area, administrative law is still in its formative stage. As such, standing to appeal an administrative decision is a relatively recent problem.[18] Nevertheless, in recent years the Supreme Court has rendered several enlightening opinions pertaining to standing in challenges to federal administrative action taken under a statute. These opinions have reflected a trend expanding the class of people who may protest administrative action by providing that a "party in interest" or any party "adversely affected" or "aggrieved" by an administrative act may have standing to sue.[19] The epitome of these decisions was reached when the Supreme Court in *Association of Data Processing Service Organizations, Inc. v. Camp*[20] defined the implications of § 10 of the Administrative Procedure Act.[21] In this case the Court rejected the "legal right" test, relied upon by the lower court, holding that it went to the merits rather than the question of standing. The rejection of this test was supplanted by a two prong test that allowed standing (1) where the plaintiff alleged injury in fact, economic or otherwise[22] resulting from the challenged action, and (2) where the interest sought to be protected or regulated was arguably within the scope of the statute or constitutional guarantee in question.[23] It should be noted, however, that "injury in fact" is the only constitutional requirement for standing that the Court has recognized. Any other requirement for standing falls within the framework of judicial construction subject to rejection through the exercise of judicial discretion. The question concerning the Administrative Procedure Act most frequently confronting federal courts has been whether a person, as public representative, has standing to challenge agency action. Many of these questions have centered upon whether a private individual, association, or organization has standing to seek injunctive relief against alleged environmental harm to public parks, recreation areas, or wildlife refuges caused by commercial or governmental developments. Some of the lower federal courts have granted standing in such instances and justify their actions by the liberal views of standing espoused by the Supreme Court.[24] These courts,

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[18]Chipley, *Environmental Law—Standing to Sue,* 6 LAND & WATER L. REV. 527 (1970).

[19]Note, *Administrative Law—Standing to Challenge Administrative Actions—Anyone Arguably Protected by Statute May Sue,* 23 VAND. L. REV. 814, 817 (1970).

[20]397 U.S. 150 (1970).

[21]5 U.S.C. § 702 (1970).

[22]*See* Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966). The Court stated that the interest sought to be protected may reflect aesthetic, conservational, and recreational values as well as economic ones.

[23]*See* Barlow v. Collins, 397 U.S. 59 (1970); *accord,* Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970).

[24]*See* Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966); Office of Communication of Ltd. Church of Christ v. FCC, 359

by conferring standing, have not always been explicit in enunciating that the plaintiff was "adversely affected" by agency action or "aggrieved" within the meaning of a relevant statute. Yet, compliance with these requirements has been evident in the facts or opinions of the particular case.[25] On the other hand, conservationist organizations have been denied standing to sue for injunctive relief where they have founded their allegations on nothing more than the preservation of the area in question however laudable such goals might be.[26]

In the instant case, the Court held that the Sierra Club failed to allege sufficient interest in the Mineral King Valley to render the organization "aggrieved" or "adversely affected" within the meaning of the Administrative Procedure Act. The Court stated that the alleged ecological harm could constitute an "injury in fact" sufficient to meet the qualifications for standing as outlined in § 10 of the Administrative Procedure Act. Yet, the Court concluded that the Sierra Club's concern for aesthetic and environmental well-being constituted little more than an injury to a cognizable interest. This, the Court stated, was insufficient to meet the "injury in fact" test, which requires that the party seeking review be among those injured. The Court observed that the Sierra Club had failed to assert that either it or its members would be directly injured by the Disney development. The Sierra Club, however, based its entire action upon the theory that this was a "public action" for the preservation of the natural resources and that its long and active participation in this area duly qualified it as a "representative of the public." This, the Court concluded, reflected a misunderstanding of the cases[27] involving "public actions" in the administrative law area. These cases required an allegation of "injury in fact" to establish standing for judicial review and that once this is established the plaintiff may argue the public interest in support of the alleged statutory violation by the agency. The Court observed that while the trend of recent cases arising under the Administrative Procedure Act expanded the categories of injury required in support of standing, this expansion does not justify abandonment of the precept that the person seeking review must personnally be injured. Thus the Court concluded that the Administrative Procedure Act requires that a person have a more direct interest than a mere concern in the problem, regardless of duration of concern and the qualifications of the organization evaluating the prob-

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F.2d 994 (D.C. Cir. 1966); Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967). *Contra,* Sierra Club v. Hickle, 433 F.2d 24 (9th Cir. 1970), *cert. granted,* 401 U.S. 907 (1970).

[25] *Accord,* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 1971); Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238 (M.D. Pa. 1970).

[26] *See, e.g.,* Alameda Conservation Ass'n v. California, 437 F.2d 1087 (9th Cir. 1971), *cert. denied,* 402 U.S. 908 (1971); Brooks v. Volpe, 329 F. Supp. 118 (W.D. Wash. 1971).

[27] *See* Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

lem, in order to establish standing for the purpose of judicial review of administrative action.[28]

The decision explicitly points out that no special treatment will be accorded conservation groups in their fight to preserve the environment. The Court appeared reluctant to change the present status quo of standing. Such a change, however, would not be anomalous for a radical departure occurred approximately four years previously in *Flast v. Cohen*.[29] Yet the Court's decision in the instant case outlined with clarity the requirements that a "public interest" organization must meet to establish standing in actions regarding environmental protection. These standards reflect nothing new but rather constitute little more than a restatement of the requirements established in *Data Processing*.[30] As a consequence, groups such as the Sierra Club will not be able to gain access to federal court simply because they represent a large number of people. This decision, therefore, blocks the trend toward a more liberal standing posture.[31] This decision will probably seriously handicap suits by ecological organizations motivated solely by the desire to preserve the natural environment. In actions of this nature, time is extremely important, since procedural delays may result in irreparable destruction of natural resources. This decision apparantly implies that standing might be established by joinder with local citizens.[32] This, however, is not feasible, for oftentimes the local citizen is too mesmerized by the immediate economic gains to see beyond the present. Few citizens are financially capable of litigating such extensive suits; however, organizations comprised of large memberships such as the Sierra Club have not only the capability but the know-how to litigate such actions. The executive branch, itself, may institute checks upon the relevant agencies. At present, a cabinet level committee in conjunction with those created by the National Environmental Policy Act[33] and by executive orders,[34] are responsible for reviewing agency action for compliance

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[28]In a dissenting opinion, Justice Douglas suggested that problem of standing in environmental cases could be circumvented by the passage of federal legislation providing litigation before federal agencies or federal courts in the name of the inanimate object about to be harmed or injured.

Justice Blackmun, in a dissenting opinion, stated he would reverse the judgment if the Sierra Club agreed to amend the complaint in the manner suggested by the majority opinion for establishing standing. Alternatively, he suggested amending the concepts of standing to allow well-meaning, established environmental organizations to litigate conservation/environmental issues.

[29]392 U.S. 83 (1968).

[30]397 U.S. 150 (1970); *accord,* Barlow v. Collins, 397 U.S. 195 (1970).

[31]Davis, *supra* note 9, at 450.

[32]*See* 71 COLUM. L. REV. 172, 177 (1971).

[33]42 U.S.C. § 4321 (Supp. I, 1971). This Act created the Council on Environmental Quality.

[34]Exec. Order, No. 11472, 3 C.F.R. 459 (Supp. 1971) and Exec. Order, No. 11514, 3 C.F.R. 531 (Supp. 1971) created the Cabinet Committee on the Environment and the Citizens Committee on Environmental Quality. The general responsibilities of these and the Council on Environmental Quality are directed toward reviewing agency action and advising the President of the findings.

with national goals of environmental protection. A possible additional method of circumventing this roadblock created by the Court is legislation aimed at eliminating many of the legal obstacles to environmental oriented litigation.[35] Proposed legislation of this nature has appeared in several states, among them, Michigan, which in 1970, enacted the model law.[36] The substance of this law is to give any person or organization standing to sue any legal entity, including governmental agencies, for the protection of natural resources and to insure the maintenance of a healthy environment.[37] Similar bills have been introduced in both houses of Congress.[38] Thus, though the instant case represents a regressive movement in the liberalizing of standing requirements for conservation groups, it may well serve as the needed impetus for responsive action by the executive and legislative branches of the government.

Joel D. Bunkley, III

CONSTITUTIONAL LAW—LOYALTY OATHS—OATH TO OPPOSE OVERTHROW OF GOVERNMENT DOES NOT VIOLATE FIRST AND FOURTEENTH AMENDMENTS; NO ADMINISTRATIVE HEARING REQUIRED WHEN OATH CONSTITUTIONAL

Appellee, a research sociologist, brought an action in federal district court to have a state loyalty oath statute declared unconstitutional and enjoin appellants[1] from requiring subscription to it. Hired by the Boston State Hospital, appellee was discharged when she refused to subscribe to a loyalty oath required of all public employees.[2] Appellee contended that the oath infringed upon her first amendment rights because of its vagueness, and that the statute violated the due process clause of the fourteenth amendment because it did not require a hearing prior to a determination not to hire because of a refusal to subscribe to the oath. The district court found the "oppose" clause unconstitu-

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[35]Chipley, *supra* note 18, at 533; *accord,* Cornwell, *From Whence Cometh Our Help? Conservationists' Search for a Judicial Forum for Environmental Relief,* 23 U. OF FLA. L. REV. 451.

[36]MICH. STAT. ANN. § 14.528 (202) (1971).

[37] Chipley, *supra* note 18, at 533.

[38]S.R. 3575, 91st Cong., 2d Sess. (1970); H.R. 16436, 91st Cong., 2d Sess. (1970).

[1]Superintendent of the Boston State Hospital and the Commissioner of the Department of Mental Health (the Commonwealth was also served with process and its Attorney General defended the suit).

[2]MASS. ANN. LAWS, ch. 264, § 14 (1968). Pertinent parts read:

> Every person entering the employ of the commonwealth or any political subdivision thereof . . . shall . . . subscribe to . . . the following oath or affirmation:—
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> "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional methods." *Id.*

tionally vague and granted the requested injunction.[3] On direct appeal to the United States Supreme Court, *held,* reversed and remanded. A state loyalty statute whereby public employees must, as a condition of employment, swear to support the Federal and State Constitutions and oppose the forceful, violent, illegal, or unconstitutional overthrow of the government, and which does not require a hearing prior to a determination to discharge, does not violate the first and fourteenth amendments. *Cole v. Richardson,* 92 Sup. Ct. 1332 (1972).

Although loyalty oaths as a condition of public employment have been a part of this country's political life since its colonization,[4] only since World War II have they been extensively required and, consequently, given rise to frequent constitutional challenges.[5] Initially, the Court reasoned that states had a legitimate interest in insuring the individual and collective loyalty, competency, and integrity of public employees and that mandatory loyalty oaths were a reasonable means to do this.[6] There was no denial of first amendment rights because the prospective employee was merely required to make a choice.[7] Since this early experience, the Court has greatly restricted the permissible scope of loyalty statutes.[8] Because first amendment rights are involved, the prin-

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[3]Richardson v. Cole, 300 F. Supp. 1321 (D. Mass., 1969). A three-judge panel is required by 28 U.S.C. § 2281 whenever an injunction is sought to prevent the enforcement of a state statute. 28 U.S.C. § 1253 provides for direct appeal to the Supreme Court from decisions of three-judge courts.

[4]Asper, *The Long and Unhappy History of Loyalty Testing in Maryland,* 13 AM. J. LEGAL HIST. 97-102 (1969).

[5]R. BROWN, LOYALTY AND SECURITY 3 (1958). Apparently only one Supreme Court case prior to 1951 was decided in which the constitutionality of a state loyalty statute was at issue. Cummins v. Missouri, 71 U.S. (4 Wall.) 277 (1867) (subscription to oath that affiant had not sympathized with or aided the Confederate States of America required before one considered competent to serve in public office declared unconstitutional).

[6]Garner v. Board of Pub. Works, 341 U.S. 716, 720-21 (1951).

[7]Adler v. Board of Educ. 342 U.S. 485, 493 (1952). The Court's reasoning in this case and in Garner v. Board of Pub. Works, 341 U.S. 716, 721 (1951) was in part, based upon the premise that public employment was a privilege, not a right. Adler v. Board of Educ., *supra* at 492; *accord,* Note, *Constitutional Law — Validity of Loyalty Oaths Required of State Employees,* 38 MISS. L. J. 321 (1967). (This note also discusses the Mississippi Subversive Activities Act, MISS. CODE ANN. §§ 4064-01 to -13 (1956), which, however, has since been declared unconstitutional. Haining v. Roberts, 320 F. Supp. 1054 (S.D. Miss. 1970)).

[8]Following *Adler,* the Court struck down every state loyalty oath it considered until Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd,* 390 U.S. 36 (1968), in which the Court considered its first "support" oath. It consistently added to the tests for constitutionality of loyalty oaths, evidencing a change in judicial attitude toward such statutes from that of approval to that of hostility. *Compare* Whitehall v. Elkins, 389 U.S. 54 (1967) and Keyishian v. Board of Regents, 385 U.S. 589 (1967) *with* Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951) and Garner v. Board of Pub. Works, 341 U.S. 716 (1951). *See generally* Comment, *Loyalty*

ciples of due process of law require that loyalty statutes be clearly and precisely constructed[9] and a strict standard of permissible statutory vagueness be applied.[10] Whenever either the construction of a statute or a narrow interpretation of its language lead to reasonable doubt as to its scope, it must yield to the due process void-for-vagueness doctrine.[11] A loyalty statute may constitutionally proscribe and sanction only that membership in subversive organizations which is with a knowledge of the organization's illegal purpose[12] and the specific intent to further that purpose.[13] Proscription of mere membership or mere knowing membership offends due process[14] and infringes on first amendment rights.[15] Advocacy which is intended to produce action to effect the illegal overthrow of the government, and which is likely to immediately produce such action may be proscribed by a loyalty statute and constitute a basis of disqualification or discharge,[16] but the mere discussion, teaching or abstract advocacy of the principles of illegal overthrow of government may not be proscribed as such would infringe upon first amendment rights.[17] Under no circumstances may one's mere beliefs be a

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Oaths, 77 YALE L. J. 739 (1968); Note, *State Loyalty Programs and the Supreme Court,* 43 IND. L. J. 462 (1968); Comment, *The Loyalty Oath as a Condition of Public Employment,* 19 BAYLOR L. REV. 479 (1967).

[9]Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); also discussed in Comment, 16 BUFFALO L. REV. 781 (1967).

[10]Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961); *accord,* Baggett v. Bullitt, 377 U.S. 360, 366-74 (1964).

[11]As stated in Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961), the applicable standard is that where "[a] statute . . . either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, [it] violates the first essential of due process of law."

For an informative discussion of vagueness and loyalty oaths, *see* Note, *The Use of the Void-for-Vagueness Doctrine to Invalidate State Loyalty Oaths,* 26 OHIO STATE L. J. 128 (1965).

[12]Wieman v. Updegraff, 344 U.S. 183 (1952), *noted in* 39 CORNELL L. Q. 118 (1953). There were indications in earlier cases that *scienter* was required, but there were no clear statements to that effect. *See* Gerende v. Board of Supervisors of Elections, 341 U.S. 56, 56-57 (1951); Garner v. Board of Pub. Works, 341 U.S. 716, 724 (1951). *But see* Adler v. Board of Educ., 342 U.S. 485, 494-96 (1952).

[13]Elfbrandt v. Russell, 384 U.S. 11 (1966). The requirement for specific intent is derived from the "membership" cases under the Smith Act, 18 U.S.C. § 2385 (1965). *See, e.g.,* Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203 (1961). For a discussion of the specific intent requirement and loyalty oaths *see* Note, *The Requirement of Specific Intent — A Further Limitation on Loyalty Oaths,* 21 Sw. L.J. 684 (1967).

[14]Wieman v. Updegraff, 344 U.S. 183, 191 (1952).

[15]Elfbrandt v. Russell, 384 U.S. 11, 18 (1966).

[16]*See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Keyishian v. Board of Regents, 385 U.S. 589, 598-602 (1967).

[17]Brandenburg v. Ohio, 395 U.S. 444, 448 (1969); Keyishian v. Board of Regents, 385 U.S. 589, 598-602 (1967).

basis for disqualification or discharge.[18] Recent cases have, for the first time, challenged oaths to support[19] or uphold[20] the Constitution. The Court has affirmed the constitutionality of such oaths stating that they are simple, direct, and unequivocal,[21] leaving no doubt that the obligation assumed is merely a recognition that the government is one of constitutional processes,[22] and, thus, imposing no restrictions on freedom of expression[23] or violating due process.[24] The law is unclear in regard to the necessity of an administrative hearing prior to disqualification from public employment for refusing to subscribe to a loyalty oath. On the one hand the Court has indicated that procedural due process does not require a hearing in the case of disqualification for failure to subscribe to an oath.[25] On the other hand, the Court has found a loyalty statute unconstitutional because it did not require a hearing prior to a determination to disqualify for failure to subscribe to the oath.[26]

In the instant case, the Court found that the first clause of the oath[27] could not be distinguished from oaths previously approved by the Court and simply indicated a commitment to abide by the constitutional system. The Court reasoned that the second clause[28] was merely the negative implication of the first and meant nothing more than a commitment not to engage in any illegal or unprotected means to change the government. The Court observed that a hearing is required only where the oath is unconstitutional. The Court then reasoned that since there is no constitutional right to overthrow the government by unlawful means, no rights are infringed by the oath; therefore, a hearing is not necessary. The Court, concluded that the loyalty oath statute in the instant case does not violate the first and fourteenth amendments.[29]

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[18]Connell v. Higginbotham, 403 U.S. 207, 209 (1971) (Marshall, J., concurring).

[19]Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd,* 390 U.S. 36 (1968), *noted in* 14 WAYNE L. REV. 635 (1968); *accord,* Hosack v. Smiley, 276 F. Supp. 876 (D. Colo. 1967), *aff'd,* 390 U.S. 744 (1968).

[20]Ohlson v. Phillips, 304 F. Supp. 1152 (D. Colo. 1969), *aff'd,* 397 U.S. 317 (1970).

[21]Hosack v. Smiley, 276 F. Supp. 876, 878 (D. Colo. 1967), *aff'd,* 390 U.S. 744 (1968).

[22]Ohlson v. Phillips, 304 F. Supp. 1152, 1154-55 (D. Colo. 1969), *aff'd,* 397 U.S. 317 (1970); *accord,* Hosack v. Smiley, 276 F. Supp. 876, 878 (D. Colo. 1967), *aff'd,* 390 U.S. 744 (1968) (government of laws and not of men).

[23]Knight v. Board of Regents, 269 F. Supp. 339, 341 (S.D.N.Y. 1967); *accord,* Hosack v. Smiley, 276 F. Supp. 876, 879 (D. Colo. 1967), *aff'd,* 390 U.S. 744 (1968).

[24]Hosack v. Smiley, 276 F. Supp. 876, 878 (D. Colo. 1967), *aff'd,* 390 U.S. 744 (1968).

[25]*Id.* at 881.

[26]Connell v. Higginbotham, 403 U.S. 207 (1971).

[27]"I will uphold and defend . . . Massachusetts."

[28]"I will oppose . . . method."

[29]In a separate concurring opinion Justices Stewart and White reasoned that since "uphold" and "defend" are not unconstitutionally vague and overbroad, then neither is "oppose." They concluded, therefore, that the oath is not invalid under the first and fourteenth amendments.

Justices Powell and Rehnquist took no part in the consideration or decision of the case.

Justice Douglas in a dissenting opinion observed that the state's highest court had found a similar oath unconstitutional[30] and that the Supreme Court was bound by that decision to find the present oath unconstitutional. He further reasoned that since the first amendment protects the advocacy of force or illegal action to change the government except where it tends to create imminent lawless action, and since the subject oath makes protected speech a possible offense, then it infringes upon first amendment rights. He concluded that the oath was unconstitutional. In another dissenting opinion, Justice Marshall, joined by Justice Brennan disagreed with the Court's conclusion that the second clause meant essentially the same as the first. He noted that the appellants had stated in oral argument that an individual who subscribed to the second clause assumed a greater obligation than one who subscribed only to the first clause. He stated that since the last clause provided an affiant with little guidance as to the responsibilities assumed under the oath, it was impermissibly vague, and that since this vagueness tended to infringe on first amendment rights, the oath was overbroad. Justice Marshall concluded, therefore, that the oath was unconstitutional.

The approval of the "support" clause of the oath in the instant case reaffirmed an established judicial policy.[31] The validation of the "oppose" clause, however, represents an assertion of authority that is supported neither by precedent nor by pertinent surrounding facts. The Court has broadly interpreted a statute that is less clear and precise than statutes that it has previously invalidated.[32] The Court has ignored a prior state court decision invalidating an oath that is less offensive to the first amendment and due process than the present oath. In finding the second clause to be essentially the same as the first, the Court has disregarded a contrary state interpretation of the oath. In view of these factors it is surprising that the Court did not find the oath unconstitutional. This departure from precedent indicates that, in the future, the balance between first amendment and due process rights and the state's interest in insuring the loyalty of public employees will be struck more in favor of the states than it has been in the past. The instant decision did not, however, provide any guidelines as to how and where the new balance is to be struck, resulting in some uncertainty as to the

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[30]Pedlosky v. Massachusetts Institute of Technology, 352 Mass. 127, 224 N.E.2d 414 (1967).

[31]The implicit attitude of the Court toward these "support" oaths is reminiscent of its attitude toward loyalty statutes in the early 1950's. While the oaths under consideration in these two periods are clearly distinguishable, this similarity of attitudes raises the question whether "support" oaths will in the future suffer the same fate as negative loyalty statutes. This would seem unlikely, however, since the Constitution prescribes "support" oaths for the President (U.S. CONST. art. II, § 7) and national and state legislators and all executive and judicial officers (U.S. CONST. art. VI, § 3). Indeed, it would seem that the fact the Constitution prescribes "support" oaths is a significant, if not controlling, reason for the Courts approval of such oaths required by state governments of their employees. *See* Cole v. Richardson, 92 S. Ct. 1332, 1336 (1972).

[32]*See, e.g.,* Baggett v. Bullit, 377 U.S. 360 (1964).

future of loyalty oaths.[33] The Court's ruling regarding due process hearing requirements reconciled the inconsistency of its earlier decisions. In doing this the Court has created new guidelines applicable for determining when a hearing is required. The logic behind the guidelines, however, is not readily understood. A determination of whether a hearing is required is made only *after* the determination of an oath's constitutionality by a court. The guidelines, therefore, do not aid those responsible for drafting and administering loyalty oaths. Furthermore, if an oath is unconstitutional, the fact that a hearing was provided is neither going to alter the oath's unconstitutional character nor legitimize disqualification on its basis.[34] On the other hand, a hearing prior to disqualification based upon a constitutional oath is essential. Only through a hearing can it be guaranteed that the oath is being properly applied. In conclusion, the guidelines provided in the instant case are meaningless. Where first amendment rights are involved, due process should require a hearing in connection with any loyalty oath that is a condition for public employment.

Robert T. Gordon, Jr.

CONSTITUTIONAL LAW—IMMUNITY STATUTES—USE AND DERIVATIVE USE IMMUNITY IS CO-EXTENSIVE WITH FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

Petitioners were subpoenaed to appear before a United States grand jury in the Central District of California. Prior to the scheduled appearances, the district court issued an order directing the petitioners to answer all questions before the grand jury under a grant of immunity conferred pursuant to 18 U.S.C. §§ 6002-03.[1] Petitioners appeared but refused to answer questions, asserting their privilege against compulsory self-incrimination,[2] notwithstanding the grant of immunity. They were both found in contempt by the district court. The Court of Appeals for the Ninth Circuit affirmed.[3] On writ of certiorari the United States

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[33]The uncertainty of the future of loyalty oaths is compounded by the split among the Justices on the decision — three dissenting, two not participating, two concurring, with only two actually composing the Court's opinion.

[34]*See* Connell v. Higginbotham, 403 U.S. 207, 209 (1971) (Marshall, J., concurring).

[1]Organized Crime Control Act, 18 U.S.C. §§ 6001-05 (1970). Section 6002 provides that when a witness in a governmental proceeeding refuses on the basis of his privilege against self-incrimination to testify, he may be ordered to do so despite his protests; however, none of the testimony or information derived from it may be used against the witness in a subsequent criminal proceeding. Other sections of the act are primarily concerned with procedures for implementing the act. For a detailed discussion of the legislative history of this act *see* 2 U .S. CODE CONG. & AD. NEWS 4017-91 (1970).

[2]U.S. CONST. amend. V.

[3]Stewart v. United States, 440 F.2d 954 (9th Cir. 1971).

Supreme Court, *held,* affirmed. Where an unwilling witness invokes the fifth amendment privilege against compulsory self-incrimination, he can be compelled to testify if he is granted immunity, as provided by 18 U.S.C. § 6002, from use of the testimony and evidence derived therefrom; and in subsequent criminal proceedings, the government will have the burden of proving that the evidence used is derived from a legitimate source, wholly independent of the compelled testimony. *Kastigar v. United States,* 92 S. Ct. 1653 (1972).

The power of government to secure the attendance and testimony of witnesses is an integral part of United States legal history.[4] However, there are limitations to this power,[5] the most important being the fifth amendment privilege against compulsory self-incrimination.[6] This privilege can be asserted in all types of governmental proceedings; and, it protects the witness by allowing him to refuse to give testimony which could be used against him in a subsequent criminal proceeding or could lead to the discovery of independent incriminating evidence.[7] It is applicable to state proceedings as well as federal.[8] Historically, this privilege has had a detrimental effect on the efforts of government to secure information vital to the preservation of an ordered society.[9] To counter this effect, legislatures have resorted to the passage of immunity statutes. By granting immunity to witnesses, government has sought to actually compel them to testify.[10] The first immunity statutes were enacted in response to specific current conditions and gave witnesses complete immunity from prosecution for offenses relating to the compelled testimony (transactional immunity).[11]

These statutes, however, were later found to be unworkable,[12] and in 1868, a new statute was enacted which limited the scope of the immunity, providing only that evidence obtained from the witness could not be used against him.[13] However, in *Counselman v. Hitchcock,*[14] the

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[4]*See* 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. ed. 1961).

[5]*See, e.g.,* Blair v. United States, 250 U.S. 273, 281 (1919).

[6]U.S. CONST. amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself . . . ."

[7]*See* Hoffman v. United States, 341 U.S. 479, 486 (1951); Blau v. United States, 340 U.S. 159 (1950); *cf.* Mason v. United States, 244 U.S. 362, 365 (1917).

[8]Malloy v. Hogan, 378 U.S. 1 (1964).

[9]Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope,* 72 YALE L. J. 1568, 1569-70 (1963).

[10]*Id.* at 1570.

[11]Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 156; *The Federal Witness Immunity Acts, supra* note 9, at 1571. *See also* 24 VAND. L. REV. 815 (1971).

[12]"As a consequence of the procedural permissiveness and broad scope of the 1857 act, the committee rooms of Congress were soon converted into confessionals to which the criminals of the land rushed to wash away their sins. The large numbers of these 'immunity baths' stimulated Congress to restrict the witness's protection offered by the 1857 act." *The Federal Witness Immunity Acts, supra* note 9, at 1572.

[13]Act of Feb. 25, 1868, ch. 13, 15 Stat. 37.

[14]142 U.S. 547 (1892).

Court held that the immunity afforded under the 1868 act[15] was not coextensive with the scope of the fifth amendment privilege against compulsory self-incrimination because it did not prevent the use of incriminating evidence derived from the protesting witness's testimony.[16] In response to the Court's decision in *Counselman,* Congress passed the Compulsory Testimony Act of 1893[17] which once more granted transactional immunity. This statute became the model for federal immunity statutes until 1964 when the Court decided *Murphy v. Waterfront Commission of New York Harbor.*[18] There, the Court departed somewhat from traditional standards by sustaining a state immunity statute which provided for transactional immunity within the state, but only restricted the use of the testimony *and its fruits* in subsequent federal proceedings.[19] Much confusion and speculation followed this decision. Finally, Congress resolved the issue by passing the Organized Crime Control Act of 1970.[20] This Act completely abandoned the transactional immunity concept outlined in *Counselman v. Hitchcock*[21] and provided immunity from the use of the compelled testimony and evidence derived therefrom (use and derivative use immunity).[22]

The instant Court first considered the petitioners' contention that no immunity statute, however drawn, could afford a lawful basis for compelling incriminating testimony. The Court rejected this contention, upholding *Brown v. Walker*[23] and *Ullman v. United States,*[24] decisions which upheld the constitutionality of immunity statutes.[25] The Court then considered the question whether the protection of immunity granted under 18 U.S.C. §§ 6001-05 was coextensive with the scope of the fifth amendment privilege against compulsory self-incrimination. The Court held that use and derivative use immunity *was* coextensive with the scope of the fifth amendment privilege, and therefore, was sufficient to compel testimony over a claim of the privilege. The Court further held that although a grant of immunity must give protection commensurate with that afforded by the fifth amendment, it need not be broader. Furthermore, the Court stated that transactional immunity afforded the

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[15]Act of Feb. 25, 1868, ch. 13, 15 Stat. 37.

[16]Counselman v. Hitchcock, 142 U.S. 547, 564 (1892); *accord,* Ullman v. United States, 350 U.S. 422 (1956).

[17]Act of Feb. 11, 1893, ch. 83, 27 Stat. 443.

[18]378 U.S. 52 (1964).

[19]"[W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." *Id.* at 79.

[20]Organized Crime Control Act, 18 U.S.C. §§ 6001-05 (1970).

[21]142 U.S. 547 (1892).

[22]Organized Crime Control Act, 18 U.S.C. §§ 6002-03 (1970).

[23]161 U.S. 591 (1896).

[24]350 U.S. 422 (1956).

[25]*See, e.g.,* Gardner v. Broderick, 392 U.S. 273, (1968); Ullman v. United States, 350 U.S. 422 (1956); McCarty v. Arndstein, 266 U.S. 34 (1924); Brown v. Walker, 161 U.S. 591 (1896).

witness broader protection than did the fifth amendment and was, therefore, not required. The petitioners contended that use and derivative use immunity would not adequately protect a witness from various incriminating uses of the compelled testimony because it would be almost impossible to identify the subtle ways in which the testimony might disadvantage the witness. The Court, citing *Murphy v. Waterfront Commission of New York Harbor*,[26] rejected this argument, holding that a witness raising a claim under the statute need only show that he testified under a grant of immunity in order to shift to the government the burden of proving that all the evidence it uses is derived from legitimate independent sources.[27] Mr. Justice Douglas, in his dissenting opinion, concluded that use and derivative use immunity could not be effectively enforced merely by placing the burden of proof on the government. Furthermore, he maintained that only full transactional immunity standards outlined in *Counselman v. Hitchcock*[28] could be coextensive with the fifth amendment privilege. Mr. Justice Marshall, dissenting, concluded that the majority's decision left the witness dependent upon the integrity and good faith of the prosecuting authorities for the preservation of his rights. He argued, moreover, that placing the burden of proof on the government was no real safeguard because the government could merely assert that the evidence was independent and the witness would not be in a position to obtain contrary evidence.

The original purpose for passing immunity statutes was to allow government to circumvent the fifth amendment privilege against self-incrimination and obtain valuable testimony from witnesses who were themselves criminally involved in the activities under investigation.[29] However, a grant of immunity can not actually *force* a witness to testify. He may choose to accept a citation for contempt rather than testify if he believes the risks are too great. Although the instant Court has found that use and derivative use immunity is coexistensive with the fifth amendment privilege, and that transactional immunity is *not* constitutionally required, it seems clear that the new standard offers a prospective witness less protection than did the former; therefore, witnesses may be less likely to *actually testify* in future governmental proceedings. As Mr. Justice Marshall pointed out in his dissent, to positively guarantee that absolutely no use will be made of the testimony or its fruits would be all but impossible. Certainly, future witnesses will weigh the hazards involved, and might well choose to accept a contempt citation rather than testify and risk even the possibility of subsequent criminal prosecution. The practical result may be that while the witness will not be denied his constitutionally protected rights, the government *will* be denied access to valuable testimony. An individual witness may often

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[26]378 U.S. 52 (1964).

[27]"Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Id.* at 79 n.18.

[28]142 U.S. 547 (1892).

[29]*See* Heike v. United States, 227 U.S. 131 (1913).

be only one member of a large criminal organization or may play only a small part in a complicated criminal conspiracy. For this reason, the government's ability to obtain testimony from witnesses involved in criminal activities should be preserved so that the testimony obtained can be used to attack crime on a broader scale, stopping it before it occurs. It is submitted that this decision, by upholding the validity of use and derivative use immunity, thereby raising fears of possible prosecution in the minds of potential witnesses, will seriously hamper the government's ability to secure this useful testimony in the future.

Jon A. Jennings

CONSTITUTIONAL LAW—SCHOOL REGULATIONS—HAIR LENGTH REGULATIONS ARE CONSTITUTIONAL IN PUBLIC SCHOOLS

Appellee, a sixteen year old student, was denied admission to high school for his junior year because he was in violation of a school board regulation concerning length of male students' hair.[1] After conferring with school officials, appellee filed suit in the U.S. District Court for the Western District of Texas seeking injunctive and declaratory relief. Plaintiff asserted that his long hair was not a disruptive influence which should properly be controlled and that the regulation violated his first and fourteenth amendment rights. The defendant contended that students' long hair caused disciplinary, health and safety problems and that such a regulation was necessary. The district court found that the reasons proposed by the school board were not valid, that there was no reasonable relation between the regulation and legitimate school board objectives, and that as a matter of law the regulation violated the due process and equal protection clauses of the fourteenth amendment. On appeal to the Fifth Circuit en banc, *held,* reversed. Students do not have the right to wear their hair in any desired length and style while attending a public school. *Karr v. Schmidt,* No. 31045 (5th Cir., April 28, 1972).

While students theoretically do not give up any of their constitutional rights when entering the academic environment,[2] litigation concerning the validity of school hair regulations has burgeoned in the last decade.[3] In considering the validity of such rules the court must ask two questions: (1) Is the student's interest in wearing long hair con-

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[1]This regulation stated:

> Hair may be blocked, but is not to hang over the ears or the top of the collar of a standard dress shirt and must not obstruct vision. No artificial means to conceal the length of the hair is to be permitted; i.e. ponytails, buns, wigs, combs, or straps.

[2]*See* Tinker v. Des Moines Ind. School Dist., 393 U.S. 503 (1969); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied* 398 U.S. 937 (1970).

[3]The first of the hair cases was Leonard v. School Comm. of Attleboro, 349 Mass. 704, 212 N.E.2d 468 (1965). In this case the court sustained a hair regulation because of what it considered a potential for disruption caused by long hair.

stitutionally protected; and (2) if it is protected what showing must a school board make to override that interest.[4] The origin of constitutional protection for long hair has been the source of a great deal of conjecture in the courts. The allegation that long hair is a form of symbolic expression protected by the first amendment has been largely rejected.[5] Regulation of hair length is not cruel and unusual punishment under the eighth amendment.[6] One of the most discussed attacks on hair rules concerns the unconstitutional invasion of privacy protected by the ninth amendment.[7] This approach has been favorably received by the First,[8] Seventh[9] and Eighth[10] Circuits, while it was disapproved by the Fifth,[11] Sixth,[12] Ninth[13] and Tenth[14] Circuits. The Seventh Cir-

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[4]84HARV. L. REV. 1702, 1704 (1971).

[5]Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970), held that although long hair may sometimes be a form of expression, it was not in the particular fact situation presented. Davis v. Firment, 269 F. Supp. 524, (E. D. La. 1967), *aff'd mem.*, 408 F.2d 1085 (5th Cir. 1969), held that the wearing of long hair does not symbolize anything. The first amendment argument was rejected by the Sixth Circuit in Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), *cert. denied*, 400 U.S. 850 (1970). Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971), stated that long hair constituted a form of conduct not intended to express an idea and thus could not be afforded protection as speech. The Ninth Circuit refused the first amendment argument in King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 92 S. Ct. 703 (1972). The Tenth Circuit dismissed this attack in Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied*, 92 S. Ct. 1292 (1972).

[6]Davis v. Firment, 269 F. Supp. 524 (E. D. La. 1967), *aff'd mem.*, 408 F.2d 1085 (5th Cir. 1969).

[7]The theoretical source of this argument is the discussion of privacy used by the Court to invalidate a Connecticutt statute forbidding use of contraceptives in Griswold v. Connecticutt, 381 U.S. 479 (1965).

[8]In Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970), the court stated that "within the commodious concept of liberty, embracing freedoms great and small, is the right to wear one's hair as he wishes." *Id.* at 1285.

[9]*See* Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

[10]Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971), held:

> We believe that, among those rights retained by the people under our constitutional form of government, is the freedom to govern one's personal appearance. As a freedom which ranks high on the spectrum of societal values, it commands the protection of the Fourteenth Amendment Due Process Clause. *Id.* at 1075.

[11]In Davis v. Firment, 269 F. Supp. 524 (E. D. La. 1967) *aff'd mem.*, 408 F.2d 1085 (5th Cir. 1969), the court proposed that "while the right of privacy may be so sacred as to be 'fundamental', the same certainly cannot be said of the free choice of grooming." 269 F. Supp. at 529.

[12]*See* Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), *cert. denied*, 400 U.S. 850 (1970).

[13]In King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 92 S. Ct. 703 (1972), the court countered the privacy argument with this rationale:

> The conduct to be regulated here is not conduct found in the privacy of the

cuit is the only one to rule that the regulation of a male student's hair length is a violation of the equal protection clause of the fourteenth amendment.[15] The circuits are divided on the question of whether such regulations violate the due process clause of the fourteenth amendment.[16] Fifth Circuit rulings prior to the instant case have intimated that the right to wear long hair was protected, even though refusing to specify the specific channel of protection.[17] In order to determine the validity of the regulation the state interest necessitating it must be balanced against the student's rights.[18] The burden of proof in such situations is

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> home but in public educational institutions where individual liberties cannot be left completely uncontrolled to clash with similarly asserted liberties of several thousand others. 445 F.2d at 938.

[14]*See* Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied,* 92 S. Ct. 1292 (1972).

[15]*See* Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970) (rule not made equally applicable to females). *Contra,* King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied,* 92 S. Ct. 703 (1972); Gfell v. Rickelman, 441 F.2d 444 (6th Cir. 1971); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), *cert. denied,* 400 U.S. 850 (1970).

[16]Those circuits approving this concept include the First, Fourth, Seventh and Eighth Circuits. *See, e.g.,* Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970).

The due process argument has been rejected in particular fact situations by the Fifth, Sixth, Ninth and Tenth Circuits. *See, e.g.,* Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied,* 92 S. Ct. 1292 (1972); King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied,* 92 S. Ct. 703 (1972); Gfell v. Richardson, 441 F.2d 444 (6th Cir. 1971); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), *cert. denied,* 400 U.S. 850 (1970); Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968), *cert. denied,* 393 U.S. 856 (1968).

[17]In Whitsell v. Pampa Ind. School Dist., 316 F. Supp. 852 (N.D. Tex. 1970), *aff'd per curiam,* 439 F.2d 1198 (5th Cir. 1971), the court stated that "the wearing of long hair . . . is a right protected . . . by the Constitution." 316 F. Supp. at 854. In Dawson v. Hillsborough County, Fla. School Bd., 322 F. Supp. 286 (M.D. Fla. 1971), *aff'd per curiam,* 445 F.2d 308 (5th Cir. 1971), the court concluded that:

> [T]he right to wear one's hair at any desired length or manner is a federally protected right. If this conclusion were incorrect, then the Fifth Circuit would not have required a showing of interference with the educational process for a hair regulation to be sustained. 322 F. Supp. at 304.

[18]Until recently the Fifth Circuit was the leader in applying this sort of situational approach. In Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968), *cert. denied,* 393 U.S. 856 (1968), the court stated that the reasonableness of such regulations must be decided in its particular setting and factual background. Griffin v. Tatum, 425 F.2d 201 (5th Cir. 1970), held that "[t]he touchstone for sustaining such regulations is the demonstration that they are necessary to alleviate interference with the educational process." *Id.* at 303.

This approach has been applied by several other circuits. *See, e.g.,* Massey v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied,*

sometimes on the student[19] and sometimes on the school board.[20] Justifications offered for hair regulations include disruption of classroom atmosphere and decorum, fights and disturbances, decreased classroom performance, and health and safety hazards.[21] Some schools offer student participation in the rule making process as a justification.[22] The Tenth Circuit views hair cases as a state problem not appropriate for federal court adjudication and dismisses such cases for failure to state a claim on which relief can be granted.[23]

In the instant case the court held that the right to style one's hair as he pleases in the public schools is not protected by the first amendment. The court rejected the ninth amendment right of privacy argument based on *Griswold* and held that a regulation limiting permissible hair length does not unconstitutionally restrict privacy. The court found that the right to wear long hair does not rise to the level of a fundamental right protected by substantive due process provisions of the fourteenth amendment. Finding that this regulation was founded on a rational basis, the court held that there was no violation of the equal protection clause. The court decided that the proper standard of review is "whether

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92 S. Ct. 703 (1972); Eisner v. Stamford Bd. of Ed., 440 F.2d 803 (2d Cir. 1971); Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).

[19]King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied,* 92 S. Ct. 703 (1972).

[20]Massey v. Henry, 455 F.2d 779 (4th Cir. 1972); Gere v. Stanley, 453 F.2d 205 (3d Cir. 1971); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Whitsell v. Pampa Ind. School Dist., 316 F. Supp. 852 (N.D. Tex. 1970), *aff'd per curiam,* 439 F.2d 1198 (5th Cir. 1971); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970); Ferrell v. Dallas Ind., School Dist. 392 F.2d 697 (5th Cir. 1968), *cert. denied* 393 U.S. 856 (1968). *See also* Eisner v. Stamford Bd. of Ed., 440 F.2d 803 (2d Cir. 1971).

[21]In Ferrell v. Dallas Ind., School Dist., 392 F.2d 697 (5th Cir. 1968), the regulation was upheld when the school board proved distraction and disturbances including fights, obscene language, and harassment of long hairs. In Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), *cert. denied,* 400 U.S. 850 (1970), a regulation was upheld on proof of threats by students against long hairs, safety hazards, and other distractions from the educational process including combing hair in class. A hair rule was struck down in Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970), despite allegations of distraction and that conforming students perform better in school. This question of countervailing interests involves the degree of substantial disruption which the school board can actually prove.

[22]In Wood v. Alamo Heights Ind. School Dist., 308 F. Supp. 551 (W.D. Tex. 1970), *aff'd mem.,* 443 F.2d 355 (5th Cir. 1970), the court viewed such student participation favorably. But in Dawson v. Hillsborough County, Fla. School Bd., 322 F. Supp. 286 (M.D. Fla. 1971), *aff'd per curiam,* 445 F.2d 308 (5th Cir. 1971), the court held that "a regulation impinging upon constitutional rights cannot be justified on the basis of the procedural machinery which led to the regulation's adoption." 322 F. Supp. at 300.

[23]Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied,* 92 S. Ct. 1292 (1972).

the regulation is reasonably intended to accomplish a constitutionally permissible state objective" and placed the burden of proof upon the one challenging the regulation. The court established a per se rule that school hair regulations are constitutionally valid. Moreover, the court directed the district courts to dismiss all future long hair suits because of failure to state a claim for which relief can be granted.[24]

In dissent Judge Wisdom stated his belief that the right for one to wear his hair as he pleases is a fundamental right embraced within the concept of "liberty." He criticized the apparent disregard of the majority of the court for the findings of fact of the lower court. In his opinion long hair is protected by the first amendment and the due process and equal protection clauses of the fourteenth amendment.[25]

By establishing a per se rule validating public school hair length regulations and a summary procedure for dismissing such actions, the Fifth Circuit has departed from its own precedents[26] and has adopted an extreme position accepted by only one other circuit.[27] The question of regulation of hair length in the public schools has risen to the level of a major dispute among the circuits,[28] but time and again the United States Supreme Court has refused to settle this conflict.[29] The only two Supreme Court Justices to speak out on the question hold differing

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[24]In a concurring opinion Judge Bell agreed with the result reached by the court and with the rational basis standard applied by the court. He expressed a belief that the element of arbitrariness had not been made clear in previous cases and perhaps caused the district court to err.

[25]In a dissenting opinion Judge Godbold favored the standards formerly established by the court in such cases as *Ferrell.* He proposed a return to the case by case approach.

In dissent Judge Roney stated that hair length regulations violated the ninth amendment because they were a substantial intrusion into personal privacy.

[26]*See, e.g.,* Griffin v. Tatum, 425 F.2d 201 (5th Cir. 1970); Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968), *cert. denied,* 393 U.S. 856 (1968).

[27]The Tenth Circuit announced such a holding in Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied,* 92 S. Ct. 1292 (1972).

[28]At the present time four circuits — the Fifth, Sixth, Ninth and Tenth — have held hair length restrictions constitutional; and four circuits — the First, Fourth, Seventh and Eighth — have held the right to wear long hair constitutionally protected. As Justice Douglas stated in his dissent to the denial of certiorari in Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied,* 92 S. Ct. 1292 (1972) (dissenting opinion): "I can conceive of no more compelling reason to exercise our discretionary jurisdiction than a conflict of such magnitude, on an issue of importance bearing on First Amendment and Ninth Amendment rights." 92 S. Ct. at 1292.

[29]Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied,* 92 S. Ct. 1292 (1972); King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied,* 92 S. Ct. 703 (1972); Stevenson v. Wheeler County Bd. of Ed., 426 F.2d 1154 (5th Cir. 1970), *cert. denied,* 400 U.S. 957 (1970); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), *cert. denied,* 400 U.S. 850 (1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970); Ferrell v. Dallas Ind. School Dist., 932 F.2d 697 (5th Cir. 1968), *cert. denied,* 393 U.S. 856 (1968).

views.[30] The solution of this question relies directly on the adjudication of major constitutional rights under the first, ninth and fourteenth amendments. In order to abridge the rights of students by regulating the length at which they can wear their hair, school boards should be required to demonstrate an important state interest which jusifies such regulations. The Fifth and Tenth Circuits have now adopted procedures in such cases which deprive the litigants of an evidentiary hearing. Our courts should not condone the usurpation of the rights of a minority by simply labelling these rights as unimportant. As the Fourth Circuit stated in a recent opinion:

> Yet "liberty" seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty.[31]

John P. Price

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[30]In Karr v. Schmidt, 401 U.S. 1201 (Black, Circuit Justice, 1970), the late Justice Black had the following comments:

> Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs. Surely few policies can be thought of that States are more capable of deciding than the length of the hair of schoolboys. *Id.* at 1202.

In a dissent to the denial of certiorari in King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied,* 92 S. Ct. 703 (1972) (dissenting opinion), Justice Douglas considered freedom to wear long hair as fundamental in our constitutional scheme which was "designed to keep government off the backs of people." *Id.* at 705. In a dissent to denial of certiorari in Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968), *cert. denied,* 393 U.S. 856 (1968) (dissenting opinion), Justice Douglas stated:

> It comes as a surprise that in a country where the States are restrained by an Equal Protection Clause, a person can be denied education in a public school because of the length of his hair. 393 U.S. at 856.

[31]Richards v. Thurston, 424 F.2d 1281, 1284-85 (1st Cir. 1970).

CONSTITUTIONAL LAW—DUE PROCESS—A NON-UNANIMOUS JURY DOES NOT VIOLATE THE REASONABLE DOUBT STANDARD OF THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE

Appellant was convicted of robbery by a jury verdict of nine to three and sentenced to serve thirty-five years imprisonment under Louisiana law, which permits convictions by a less than unanimous verdict in cases where the punishment is necessarily at hard labor.[1] The Louisiana Supreme Court affirmed the conviction and rejected appellant's argument that the statute violated the due process and equal protection clauses of the fourteenth amendment.[2] On appeal to the United States Supreme Court, *held,* affirmed. A jury verdict of nine to three as provided for by Louisiana law did not deprive the appellant of due process for failure to satisfy the reasonable doubt standard. *Johnson v. Louisiana,* 92 S. Ct. 1620 (1972).[3]

Unanimous jury verdicts became a part of the common law criminal trial in the fourteenth century.[4] Jury unanimity in criminal trials[5] is provided for in all but six states in this country.[6] The Supreme Court

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[1]LA. CRIM. PRO. CODE ANN. art. 782, § 41 (1967) provides:
Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict. Cases in which the punishment may be imprisonment at hard labor, shall be tried by a jury composed of five jurors, all of whom must concur to render a verdict. Except as provided in Article 780, trial by jury may not be waived.

[2]State v. Johnson, 225 La. 314, 230 So.2d 825 (1970).

[3]Appellant conceded that Duncan v. Louisiana, 391 U.S. 145 (1968), which made the sixth amendment trial by jury in criminal cases applicable to the states through the fourteenth amendment, did not apply since it was decided after his trial had begun. In Apodaca v. Oregon, 92 S. Ct. 1628 (1972), which was decided with the instant case, the Court held that the sixth amendment, as made applicable to the states by the fourteenth amendment, did not require jury unanimity.

[4]1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 318 (7th ed. 1956). *See also* Grooms, *The Origin and Development of Trial by Jury,* 26 ALA. LAW. 162 (1965) (for discussions on the historical development of jury trials); Haralson, *Unanimous Jury Verdicts in Criminal Cases,* 21 MISS. L.J. 185 (1950).

[5]Approximately one-half of all the states require only a majority verdict in civil cases where the proof must only be by a preponderance of the evidence. Comment, *Should Jury Verdicts be Unanimous in Criminal Cases?* 47 ORE. L. REV. 417 (1968). *See, e.g.,* MISS. CODE ANN. § 1801 (1956).

[6]Louisiana and Oregon are the only two states which permit convictions by less than unanimous verdicts in felony cases. *See* ORE. CONST. art. 1, § 11 (1970).

Four other states permit convictions by less than unanimous verdicts in misdemeanor cases. IDAHO CODE ANN. § 19-1902 (1948), permits misdemeanor convictions by a five-sixths majority vote. OKLA. CONST. art. II, § 19, provides that three-fourths of the jury may render a verdict in less than felony cases. TEX. CONST. art. 5, § 13,

has held that jury unanimity is a requirement of jury trials in federal courts,[7] but the Court has also stated in dicta more than once that the due process clause of the fourteenth amendment might not be violated by a state law that would dispense with unanimous juries.[8] These decisions have even suggested that a state could dispense with criminal juries entirely without violating due process.[9] Another case has suggested that the due process clause of the fourteenth amendment requires only that criminal trials be fundamentally fair.[10] The standard that the state has the burden of proving every necessary element of the crime beyond a reasonable doubt in order to obtain a conviction became, along with jury unanimity, a part of the criminal jury trial towards the latter part of the eighteenth century.[11] The Supreme Court has often upheld the view that guilt must be proved beyond a reasonable doubt in criminal cases.[12] The Court expressly held in *In Re Winship*[13] that the due process clause of the fourteenth amendment required that the accused must be protected against conviction unless the reasonable doubt standard was met. Whether or not proof beyond a reasonable doubt required that the jury be unanimous was a question presented in two circuits with opposite results. In *Hibdon v. United States,*[14] the Court held that unanimity was inseparable from reasonable doubt and was required by due process. The Court held in *Fournier v. Gonzalez*[15] that due process did not require a unanimous jury verdict and that the state met its burden of proof with a ten to two jury verdict.

In the instant case, the Court held that the mere lack of jury unanimity alone does not mean that the reasonable doubt standard, which is required by the due process clause of the fourteenth amendment, has been violated.[16] The Court felt that merely because three

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provides that nine out of twelve jurors may render a verdict in civil cases and crimes below the grade of felony. MONT. CONST. art. III, § 23, provides that two-thirds of the jury may render a verdict in misdemeanor cases.

[7]Andres v. United States, 333 U.S. 740 (1948); Patton v. United States, 281 U.S. 276 (1930). *See* FED. R. CRIM. P. 31(a) (requires unanimous jury verdicts). With reference to seventh amendment civil jury trials, *cf.* American Publishing Co. v. Fisher, 166 U.S. 464 (1897) (which require these jury verdicts to be unanimous).

[8]Jordan v. Massachusetts, 225 U.S. 167 (1912) (dictum); Maxwell v. Dow, 176 U.S. 581 (1900) (dictum).

[9]*Id.*

[10]Palko v. Connecticut, 302 U.S. 319 (1937).

[11]C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 321 (1954). *See also* Morano, *Retreat from Unanimity and Reasonable Doubt in Criminal Cases,* 1 U. TOL. L. REV. 337 (1969), for a discussion on the origin of the reasonable doubt standard in relation to jury unanimity.

[12]*See, e.g.,* Brinegar v. United States, 338 U.S. 160 (1949); Coffin v. United States, 156 U.S. 432 (1895); Davis v. United States, 160 U.S. 469 (1895).

[13]397 U.S. 358, 364 (1970).

[14]204 F.2d 834 (6th Cir. 1953).

[15]269 F.2d 26 (1st Cir. 1959), *cert. denied,* 359 U.S. 931 (1959).

[16]The Court also found that the statute did not violate equal protection. It stated that the state had a rational basis (facilitating, expediting, and reducing

jurors voted to acquit, it did not follow that the majority failed to honestly find that the proof reflected guilt beyond a reasonable doubt. The Court stated that there was no reason to believe that a reasoned discussion among the jurors did not occur prior to the attainment of a majority verdict for conviction. The Court considered it far more likely that the minority of the jurors would have swayed more jurors to their side if the argument in favor of acquittal was persuasive. The Court concluded that the state had satisfied its burden of proof when nine jurors voted to convict. It also rejected the contention that the vote of the three jurors for acquittal impeached the verdict of the other nine, so that it could be said that guilt was not in fact proved beyond a reasonable doubt. The Court concluded that disagreement alone did not establish reasonable doubt, in view of the fact that a heavy majority was convinced of guilt. The Court pointed out that the fact that rational men may disagree does not indicate a failure of proof beyond a reasonable doubt. It was further stated by the Court that jury verdicts have been regularly sustained even though there was evidence that the jury could have entertained a reasonable doubt,[17] the judge might have disagreed with the jury,[18] or the appellate judges could not agree among themselves on the issue of whether or not there was sufficient evidence to support a verdict.[19] The Court concluded therefore that the appellant was not deprived of due process where a heavy majority of the jurors voted to convict.[20]

The decision of the Court is another step in a trend to de-emphasize the value of the twelve man jury. In *Williams v. Florida,*[21] the Court held that the right to trial did not include the right to a twelve man jury. The states are, therefore, free to provide for criminal juries of less than twelve men. The instant decision not only reduces the size of the jury; it goes one step further. It allows the viewpoints of the majority dissenters to be entirely disregarded. With a unanimity requirement, the voice of even a lone dissenter must necessarily be heard.[22] A further

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expense in the administration of justice) for the classification provided for in the statute (unanimous juries for capital cases, verdicts of 9-3 for felonies, and juries of 5 for misdemeanors). The Court found this method of classification not to be invidious.

[17]United States v. Quarles, 387 F.2d 551, 554 (4th Cir. 1967).

[18]Takahashi v. United States, 143 F.2d 118, 122 (9th Cir. 1944).

[19]United States v. Johnson, 433 F.2d 1160, 1166 (D.C. Cir. 1970).

[20]In a concurring opinion, Justice Blackmun indicated he would have difficulty upholding a 7-5 standard.

In dissent, Justice Stewart, joined by Justice Brennan and Justice Marshall, determined that the fourteenth amendment required jury unanimity to guarantee against systematic discrimination in the selection of criminal juries.

Justice Douglas, in a dissenting opinion joined by Justice Brennan and Justice Marshall, asserted that even though the Constitution did not mention unanimous juries, neither did it mention the presumption of innocence, nor did it say that guilt must be proved beyond a reasonable doubt in criminal cases.

[21]399 U.S. 78 (1970).

[22]*See* Zeisel, *The Waning of the American Jury,* 58 A.B.A.J. 367, 369 (1972).

effect of the decision will be to strengthen the hand of the prosecution, which will reduce the number of hung juries.[23] In view of this, the presumption of innocence has been undercut, and the burden of proof has been shifted towards the defendant. The defendant is faced with a greater burden to prove his innocence when more than three jurors must be convinced that there is a reasonable doubt in order for him to gain an acquittal. In view of the recent decision of *In Re Winship*,[24] which held the reasonable doubt standard to be a requisite of fourteenth amendment due process, the Court was forced to define the reasonable doubt standard in relation to the jury in the instant case. In doing so, the Court could have reached a different but entirely logical and reasonable conclusion. Instead of defining reasonable doubt in terms of individual jurors as it did, it could have defined it in relation to the jury as an entity.[25] In this light, the reasonable doubt of any one part of that entity becomes a reasonable doubt of the entity as a whole. Thus, jury unanimity would have been preserved. The Court did not choose to consider this line of reasoning and chose to say instead that the reasonable doubt of an individual juror did not mean other jurors entertained a reasonable doubt. Even in adopting the line of reasoning that it has, the Court failed to establish definitive guidelines for state legislatures to follow. The Court stated that a heavy majority of nine to three was permissible, but failed to indicate whether lesser majority verdicts would be adequate. Future decisions engendered by foreseeable state legislative reactions to the instant case will undoubtedly specify in more precise terms what is meant by a "heavy majority".

George Lyles

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[23]For a thorough discussion on the effect of hung juries by non-unanimous verdicts, *see* Kalvin and Zeisel, *The American Jury, Notes for an English Controversy*, 48 CHI. B. REC. 195 (1967).

[24]397 U.S. 358 (1970).

[25]*See* Ryan, *Less Than Unanimous Jury Verdicts in Criminal Trials*, 58 J. CRIM. L. 211 (1967).

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—WARRANTLESS INSPECTION IN ENFORCEMENT OF FEDERAL GUN CONTROL ACT IS CONSTITUTIONAL UNDER THE FOURTH AMENDMENT

Respondent was convicted in federal district court[1] of dealing in firearms without having paid a special occupational tax.[2] The evidence which convicted respondent was obtained during an inspection authorized by the Gun Control Act of 1968.[3] A United States Treasury Agent, who presented identification, inspected respondent's records and requested permission to inspect a locked gun storeroom. When respondent asked if the agent had a search warrant, he was shown a copy of the statute authorizing inspection.[4] After reading the statute, respondent unlocked the room and the agent discovered the violation.[5] Respondent maintained that the Gun Control Act was unconstitutional under the fourth amendment in permitting inspection of non-public business areas without a search warrant.[6] In addition, he contended that his consent to the search was not voluntary. The trial court refused to accept respondent's allegations. The 10th Circuit Court of Appeals reversed, holding that under recent precedent the act was unconstitutional and that the evidence seized had to be suppressed.[7] On writ of certiorari the United States Supreme Court, *held,* reversed and remanded. Warrantless inspection of gun storeroom, authorized under federal gun control act which results in seizure of evidence is not prohibited by the fourth amendment. *United States v. Biswell,* 92 S. Ct. 1593 (1972).

The right to be free from unreasonable search and seizure was an element productive of the Revolutionary War.[8] Its origins in our Con-

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[1]United States District Court for the District of New Mexico; Case unreported.

[2]Respondent was licensed to sell certain sporting weapons under 18 U.S.C. § 923 (1968). The weapons found in his possession were "firearms" under 26 U.S.C. § 5845(a) (1968), therefore he was required to pay a special occupational tax of $200.00 a year under 26 U.S.C. § 5801 (1968).

[3]18 U.S.C. § 921 *et seq.* (1968).

[4]The pertinent section states:

> The Secretary may enter during business hours the premises (including places of storage) of any . . . dealer . . . for the purpose of inspecting or examining (1) any record or documents required to be kept . . . , and (2) any firearms or ammuntion kept or stored . . . at such premises. 18 U.S.C. § 923(g) (1968).

[5]The violation was possession of two sawed off rifles under 26 U.S.C. § 5845(a) (1968).

[6]U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. *Id.*

[7]United States v. Biswell, 442 F.2d 1189 (10th Cir. 1971).

[8]J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 20 (1966).

stitution were a result of the notorious writs of assistance used as general search warrants by the English in the American colonies.[9] However, after the fourth amendment's advent, no further cases of importance were reported until 1886, in *Boyd v. United States*.[10] This case, which has been repeatedly cited by the Court on subsequent occasions, sets forth a debatable connection between the fourth amendment and the self-incrimination clause of the fifth amendment. Thereafter, it was reasoned that the fourth amendment applied only to criminal activities.[11] This principle remained virtually unchallenged throughout the first half of the twentieth century[12] with the result that civil and administrative inspections proceeded unchecked.[13] During this period, dicta in criminal cases concerning search and seizure doctrine indicated greater emphasis on the intrusion of the search than the purpose involved.[14] This shift was brought to the surface in 1949 by the Court of Appeals for the District of Columbia. In a case concerning a conviction for refusal to allow a warrantless search by a health department inspector, the court held that civil and criminal proceedings were to be subjected to the same standards under the fourth amendment.[15] The decision was not to remain viable, because in 1959, an opposite result was reached by the Supreme Court in *Frank v. Maryland*.[16] In a 5-4 decision, the Court ap-

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[9]N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION 55 (1937).

[10]116 U.S. 616 (1886) (Boyd involved a statute which required businessmen to produce any records which would tend to prove any allegation made by the United States that the defendant had violated revenue laws).

[11]*See* Comment, *Administrative Inspection Procedures Under The Fourth Amendment-Administrative Probable Cause*, 32 ALBANY L. REV. 155, 157 (1967).

[12]During this period a steady stream of criminal cases concerning search and seizure were reviewed by the Court with the resulting development of the federal exclusionary rule in Weeks v. United States, 232 U.S. 383 (1914). The rule was subsequently extended to the states in Mapp v. Ohio, 367 U.S. 643 (1961). The rule protected against the use of evidence obtained through illegal search and seizure.

[13]Numerous challenges during this period to the administrative inspection of commercial premises were without success. *See, e.g.*, Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (inspection of records under the Fair Labor Standards Act); Currin v. Wallace, 306 U.S. 1 (1939) (challenge to constitutionality of inspection powers under Tobacco Inspection Act of 1935); Wilson v. United States, 221 U.S. 361 (1911) (inspection of offending matter in regard to mail fraud).

[14]*See* 48 DENVER L. J. 87, 90 (1971).

[15]*See* District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950); Judge Prettyman stated for the majority:

> To say that a man suspected of crime has a right to protection against search of his home without a warrant but that a man not suspected of crime has no such protection is a fantastic absurdity. 178 F.2d 13.

Judge Holtzoff argued vigorously for the dissent that the fourth amendment had no applicability to administrative inspections.

[16]359 U.S. 360 (1959). A factual situation similar to District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950), existed here i.e., conviction for refusal to submit to a warrantless inspection by municipal authorities. Although the cases on municipal inspections are not directly in point

proved the lower court's conviction. The opinion noted that inspections of this type, i.e., municipal or administrative, are only on the periphery of the important rights safeguarded by the fourth amendment.[17] The following year, a case with similar facts once again faced the Court.[18] The appeal was affirmed per curiam by an equally divided Court.[19] Nonetheless, the dissenting opinion by Justice Brennan demonstrated that the Court was far from having a stable doctrine in *Frank v. Maryland.*[20]

The constitutionality of administrative inspections lay dormant until the twin decisions in *Camara v. Municipal Court*[21] and *See v. City of Seattle*[22] were handed down by the Court in 1967. The change in personnel was evident as *Frank* was expressly overruled.[23] The importance of these decisions to the instant case was the holding in *See,* which specifically extended fourth amendment protection to administrative inspection of commercial premises. The gravity of *See* was undercut by a reservation interposed by Justice White. He expressly limited *See* to its facts and stated that there was no implication that the Court was questioning regulatory programs, e.g., licensing certain businesses.[24] Although many legal writers were lauding the result of *Camara* and *See* as a clarification of the confusing doctrine surrounding the field of administrative searches,[25] most were ignoring Justice White's admonition

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with the instant decision, their mention is essential to demonstrate the development of the law.

[17]Frank v. Maryland, 359 U.S. 360, 367 (1959). *See also* Sonnenreich & Pinco, *The Inspector Knocks: Administrative Inspection Warrants Under An Expanded Fourth Amendment,* 24 S.W. L.J. 418, 425 (1970) (an extended discussion of Frank and its reasoning).

[18]Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960).

[19]Justice Stewart took no part in this decision because his father was sitting on the Ohio Supreme Court when it decided the case. Ohio *ex rel.* Eaton v. Price, 168 Ohio St. 123, 151 N.E.2d 523 (1958).

[20]359 U.S. 360 (1959) (dissent maintained that the warrant framework should be used in administrative inspections with a relaxed doctrine of probable cause).

[21]387 U.S. 523 (1967) (reversal of a conviction for refusal to allow an inspection by the city housing authorities).

[22]387 U.S. 541 (1967) (extended Camara's fourth amendment protection to inspection of non-public business premises).

[23]Justice White replaced Justice Frankfurter in 1962. The same year Justice Goldberg replaced Justice Whittaker. Justice Goldberg resigned in 1965 and Justice Fortas took his place.

[24]In his opinion Justice White stated:

> We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product. 387 U.S. at 546.

[25]*See* Comment, *Administrative Inspection Procedures Under The Fourth Amendment—Administrative Probable Cause, supra* note 11, at 181; 42 CONN. B.J. 255, 264-65 (1968). *ut cf.* Sonnenreich & Pinco, *supra* note 17, at 431 n.101.

regarding the Court's attitude on regulatory inspections.[26] Therefore, it was not suprising when several federal courts declared *Camara* and *See* inapplicable to administrative inspections authorized by Congress as part of a regulatory licensing program.[27] These decisions cited *See* as exempting such searches from the warrant requirements of the fourth amendment.[28] In *Colonade Catering Corp. v. United States* another circuit court ruling followed this line of decisions[29] and was reversed by the Supreme Court.[30] The Court recognized the long history of governmental control on the liquor industry and did not question the authority of Congress to implement such law. However, several qualifications were made which would lead to the instant decision. The Court first set forth that in the absence of explicit legislative regulation of the mode of inspection, the guidelines of the fourth amendment must be followed.[31] More important, the Court stated that the Congressional mandate had not authorized *forcible* entry without a search warrant. The Court concluded that the express provisions for penalties when entry was refused demonstrated the legislative choice of a standard precluding the use of force without a warrant.[32] *Colonade* indicated that the Court felt Congress could legislate narrowly defined statutes authorizing warrantless regulatory inspections. The only stumbling block to practically unlimited searches was that there be an informed voluntary consent.[33] Although the stage seemed to be set for the instant case, a decision in 1971 allowing welfare worker's "visitation" as a condition to receive Aid For Dependent Children payments clouded the question of administrative inspections.[34] The problem introduced was the Court's examination of *Camara* and *See*. In distinguishing them, it was surmised that they concerned criminal prosecutions for refusal to permit searches, whereas only a civil sanction attached to a refusal to submit to a welfare worker's visit.[35] The Court stated that had there been some criminal prosecution involved in a refusal, *Camara* and *See*

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[26]*See* note 24 *supra.*

[27]United States v. Sessions, 283 F. Supp. 746 (N.D. Ga. 1968); United States v. Duffy, 282 F. Supp. 777 (S.D.N.Y. 1968) (Internal Revenue Service inspections under 26 U.S.C. § 5146(b) (1958). *Contra,* United States v. Stanack Sales Co., 387 F.2d 849 (3d Cir. 1968).

[28]An important collateral issue was raised which is beyond the scope of full discussion in this note; the voluntariness of consent given in submission to an official's claim of authority. This question has been extensively discussed in criminal cases. *See, e.g.,* Bumper v. North Carolina, 391 U.S. 543 (1968).

[29]410 F.2d 197 (2d Cir. 1969).

[30]397 U.S. 72 (1970).

[31]*Id.* at 77.

[32]*Id.* at 77. The dissent felt that the Congressional mandate had included the right to make forcible warrantless searches. *Id.* at 78-81.

[33]A federal court subsequently examined this problem in United States v. Alfred M. Lewis, Inc., 431 F.2d 303 (9th Cir. 1970) (inspection under Federal Food, Drug, and Cosmetics Act, 21 U.S.C. § 374(a) (1962)).

[34]Wyman v. James, 400 U.S. 309 (1971).

[35]*Id.* at 325.

would apply and a search warrant would be necessary to conduct an inspection.[36]

In the instant case, the Court held that *See* reserved the question of fourth amendment applicability to federal regulatory statutes authorizing warrantless inspections.[37] The Court also stated that an analogy could be drawn between one who voluntarily submits to a lawfully authorized regulatory inspection and a person who acquiesces to a search of a dwelling authorized by a warrant. In both situations, the person is accepting the mandate of legal process rather than face criminal sanctions. Furthermore, the Court rejected as inapposite a challenge based on submission by involuntary consent, coerced under color of law. The Court held that the legality of a search which is carefully regulated by statute is structured on the authority of valid legislation and not on consent. The Court noted that although gun control is not as deeply rooted as regulation of the liquor industry, there is an inherent public interest in effective control of firearms traffic and warrantless, unannounced inspections are necessary to achieve the goals of the statute. The Court also said that where a businessman chooses to deal in a heavily regulated industry, he is held to be informed as to the necessity, expectability, and limits of governmental inspections. Under such regulatory statutes, the dealer's right of privacy is not unjustifiably interfered with by inspections performed without a warrant. Therefore, the Court concluded that where an urgent federal interest is involved and the interference with privacy is not unreasonable, a warrantless inspection may be authorized by a statute narrowly limited in time, place, and scope without offending the protection afforded by the fourth amendment.[38]

Justice Douglas, in dissent, stressed that the decision in *Colonade* involved a statute very similar to the one in the instant case. He rejected the majority's reasoning that had the search in *Colonade* been without forcible entry, it would not have been reversed. Justice Douglas also maintained that consent in *Biswell* was not freely given.[39]

The decision in *Biswell* was not totally unexpected. The previous opinions concerning warrantless inspections dealt primarily with administrative searches of dwellings. Until the decision in *See,* the Court had traditionally shown more respect for the protection of individuals from governmental control than businesses.[40] One indicator of the Court's reluctance to burden regulatory programs with the warrant procedure was Justice White's express reservation in *See* regarding licensing controls.[41] Furthermore, Justice Douglas gave a preview of his attitude

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[36]This statement seems to be a reversion to the civil/criminal distinction of Boyd v. United States, 116 U.S. 616 (1886).

[37]*See* note 24 *supra.*

[38]Justice Blackmun concurred, noting his support of the dissent written by Justice Black in Colonade Catering Corp. v. United States, 397 U.S. 72, 79 (1970).

[39]*See* Colonade Catering Corp. v. United States, 397 U.S. 72 (1970).

[40]*See* cases cited note 13 *supra.*

[41]*See* note 24 *supra.*

on the matter in his dissent to *Wyman v. James.*[42] Although *Colonade* overturned a warrantless inspection, the Court's basic posture did not change. It simply added a caveat to the existing doctrine: the statutorily authorized inspection was valid as long as forcible entry was not involved. At that point the court seemed to be developing a clear doctrine. However, the logic in *Wyman* interjected confusion into the developing law. The implication that where the consequences of an administrative search may result in criminal prosecution, the warrant procedure is required, introduced a legal theory which is difficult to reconcile with *Biswell.* There is little doubt that the fruits of an inspection under a gun control statute may produce criminal sanctions, yet warrantless procedure was fully approved in the instant case.

Another element of uncertainty in *Biswell* is the standard applied in determining whether consent is voluntarily obtained or subtly coerced. This has been discussed primarily in criminal cases, and the Court refused as "inapposite" its own criminal consent standard. Evidently, the Court has held dealers in areas of heavy federal regulation to some type of constructive consent as a prerequisite to doing business in the industry. With Congress continually extending federal control over various segments of the business world, who is to say which industries deal in urgent federal interests? It is submitted that the Supreme Court has become the final arbiter of reasonableness of administrative inspections and will of necessity be required to examine the constitutionality of any federal agency's inspection procedure. The Court has possibly burdened itself with another endless task to be added to its already crowded docket. Justice White acknowledged this theory in *See* by stating:

> Any constitutional challenge to such programs can only be resolved, as many have been in the past, on a case by case basis under the general Fourth Amendment standard of reasonableness.[43]

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[42]Justice Douglas stated:
There is not the slightest hint in *See* that the government could condition a business license on the consent of the licensee to the administrative searches we held violated the fourth amendment. 400 U.S. 309, 331 (1971).
[43]See v. City of Seattle, 387 U.S. 541, 546 (1967).

Criminal Law—Presumption that Death Occurs Where Body Found is Sufficient to Confer Jurisdiction

Defendant was indicted in a Mississippi court for the murder of a Tennessee resident whose body was found in Mississippi. Although the defendant confessed to the murder,[1] there was uncertainty whether the death occurred in Tennessee, where the shooting took place, or in Mississippi, where the body was found. The trial court on its own motion[2] determined in a pretrial hearing that it did not have jurisdiction over the matter, since the proof did not show beyond a reasonable doubt that the deceased's death occurred in Mississippi. On appeal to the Mississippi Supreme Court, *held,* reversed and remanded. In a criminal prosecution for murder, the presumption that death occurs where a body is found is sufficient to allow the case to go to the jury and to permit the court to assume jurisdiction. *State v. Fabian,* 263 So. 2d 773 (Miss. 1972).

It is fundamental in criminal prosecutions that the accused has a right to be tried in the place where the offense was committed,[3] and that jurisdiction lies solely with the state in which the offense was committed.[4] Problems arise, however, in cases where the offense was com-

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[1]The trial court's refusal of the defendant's motion to suppress his previous confession was appealed. The court in the latter part of its opinion went to great lengths in its discussion of the confession and concluded that the confession was freely and voluntarily given.

[2]Defendant had originally moved to quash the indictment for lack of jurisdiction. The trial court, however, over-ruled this motion when the appellee refused to offer evidence in support of the motion. The lower court then on its own motion inquired into the matter. This court stated that such procedure is novel and unknown in Mississippi criminal procedure. While the court did not entirely exclude such practice, it did say that it must be used only under the most exceptional circumstances and as an exercise of sound judicial discretion.

[3]U.S. Const. amend. VI; Miss. Const. art. 3, § 26; Kisner v. State, 209 Md. 524, 122 A.2d 102 (1956); Murtagh v. Leibowitz, 303 N.Y. 311, 101 N.E.2d 753 (1951). The principle had its origin in the common law institution of trial by jury, for under early English law the jury was composed of witnesses to the crime. The trial was held in the place where the offense occurred because of the convenience of the forum and witnesses and also because the accused would have the benefit of his good character among his neighbors. The principle has continued to be applied not only because of the availability of the witnesses, but also because it acts as a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place. The principle was based upon the assumption that the offender would confine his operation to his own neighborhood, however, with the mobility of today's society, the principle has lost much of its merit. State v. Brown, 103 Vt. 312, 154 A. 579, 579-80 (1931); Comment, *Venue in Louisiana Criminal Cases Under Amended Article 13, Code of Criminal Procedure,* 15 La. L. Rev. 757 (1955).

[4]Huntington v. Attrill, 146 U.S. 657 (1892); Stewart v. Jessup, 51 Ind. 413, 19 Am. R. 739 (1875); State v. Kelly, 76 Me. 331, 49 Am. R. 620 (1884); People v.

mitted near a state boundary and specifically in cases where the offense continued from one state to another. In such cases, it must be determined which state has jurisdiction over the offense. In order for one state to assume jurisdiction, it must prove that at least part of the offense was committed within its boundaries. Therefore, proof of venue, the place of the crime, is essential to the state's assumption of jurisdiction.[5] At common law a state had no jurisdiction of an offense consummated within its borders if the offense was commenced in another state.[6] Yet, today, many jurisdictions, including Mississippi, have adopted statutes which have expanded the jurisdictional limitations, and have allowed a state to assume jurisdiction of an offense if it is commenced or consummated within its borders.[7] These statutes are usually remedial in nature, and their object is to extend jurisdiction beyond the boundaries prescribed by common law, thus, preventing a miscarriage of justice.[8] One such statute, which has been adopted in Mississippi, states that in a homicide case, either the mortal stroke or the result of that stroke, death, must have taken place in Mississippi to permit Mississippi to assume jurisdiction.[9] This statute places the burden upon the state to prove the location of either occurrence by the quantum of proof that the law requires in the specific case before the court.[10] In Mississippi the courts have held that venue must be proved beyond a reasonable

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Devine, 185 Mich. 50, 151 N.W. 646 (1915); State v. Kief, 12 Mont. 92, 29 P. 654 (1892); State v. Cutshall, 110 N.C. 538, 15 S.E. 261 (1892); State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894); Ex Parte McNeely, 36 W. Va. 84, 14 S.E. 436 (1892).

[5]*See* Norris v. State, 143 Miss. 365, 108 So. 809 (1926); Dorsey v. State, 141 Miss. 600, 106 So. 827 (1926); Quillen v. State, 106 Miss. 831, 64 So. 736 (1914). While jurisdiction and venue are closely related in criminal cases, they are distinguishable. Jurisdiction refers to a state's judicial power to try a case; venue refers to the particular place within a state in which a case may be tried. In criminal cases venue is the place where the offense was committed. In the instant case, we are dealing primarily with the broader question of jurisdiction, and specifically with the question of whether Mississippi may assume jurisdiction over the case. In order for Mississippi to obtain jurisdiction, there must be proof that the crime, or an essential part of the crime, occurred within the state. Normally this proof is established when the prosecution presents evidence as to the location of the offense which results in proof of venue. Therefore, venue is an essential part of jurisdiction which must be proved for jurisdiction to be complete. It should be remembered when the court speaks of venue in the instant case, that it is in reference to venue as *part* of jurisdiction.

[6]Brown v. State, 108 Ala. 18, 18 So. 811 (1895), *overruled in* Amos v. State, 123 Ala. 50, 26 So. 524 (1898); De Graffenried v. State, 28 Ala. App. 291, 182 So. 482 (1938).

[7]An example of this expansion of venue is found in Miss. Code Ann. §§ 2427 & 28 (1956). As a result of these statutes, the Mississippi courts are allowed to assume jurisdiction if the offense is commenced or consummated in this state.

[8]Robinson v. Commonwealth, 217 Ky. 129, 288 S.W. 1044 (1926); People v. Licenziata, 199 App. Div. 106, 191 N.Y.S. 619 (1921); People v. Vario, 165 Misc. 842, 2 N.Y.S.2d 611 (1938).

[9]Miss. Code Ann. § 2430 (1956).

[10]Isabel v. State, 101 Miss. 371, 58 So. 1 (1912).

doubt and to the exclusion of every other reasonable hypothesis.[11] Several jurisdictions have held that a presumption that the death occurred where the body was found is sufficient to meet the degree of proof required for venue.[12] Yet in several of these jurisdictions the degree of proof required is merely a preponderance of the evidence, and proof is not required to be beyond a reasonable doubt.[13] Previously, this presumption had never been discussed by the Mississippi courts.

In the instant case the court stated that factual questions of venue are for determination by the jury. It further recognized that in Mississippi, proof of venue is essential for jurisdiction, and reviewed the law in Mississippi pertaining to the degree of proof necessary for venue. Two presumptions were adopted by the court: (1) death occurs where the body is found; and (2) life continues until there is evidence to the contrary.[14] The court concluded that a trial judge need only determine

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[11]In Poore v. State, 205 Miss. 528, 37 So. 2d 3 (1948), *suggestion of error overruled,* 205 Miss. 528, 37 So. 2d 357 (1948), *cert. denied,* 336 U.S. 992 (1948), *rehearing denied,* 336 U.S. 1947 (1948), the Mississippi Supreme Court held that venue could be proved by either direct or circumstantial evidence. The general rule for criminal prosecutions in Mississippi requires that venue be proved beyond a reasonable doubt. When venue is shown by circumstantial evidence, however, it must be shown to the exclusion of every other reasonable hypothesis. Jackson v. State, 246 So. 2d 553 (Miss. 1971); Turner v. State, 220 So. 2d 295 (Miss. 1969); Jones v. State, 230 Miss. 887, 94 So. 2d 234 (1957); Clark v. State, 230 Miss. 143, 92 So. 2d 452 (1957); Crum v. State, 216 Miss. 780, 63 So. 2d 242 (1953); Whitten v. State, 189 Miss. 809, 199 So. 74 (1940); Kitchens v. State, 186 Miss. 443, 191 So. 116 (1939); Ussery v. State, 154 Miss. 704, 123 So. 854 (1929); Dorsey v. State, 141 Miss. 600, 106 So. 827 (1926).

[12]These jurisdictions include the following:

California, People v. Kamaunu, 110 Cal. 609, 42 P. 1090 (1895); *Maryland,* Breeding v. State, 220 Md. 193, 151 A.2d 743 (1959); *Massachusetts,* Commonwealth v. Knowlton, 265 Mass. 382, 163 N.E. 251 (1928); *Nebraska,* Hawkins v. State, 60 Neb. 380, 83 N.W. 198 (1900); *New Hampshire,* State v. Forbes, 75 N.H. 306, 73 A. 929 (1909); *New Jersey,* State v. McDowney, 49 N.J. 471, 231 A.2d 359 (1967); *New Mexico,* State v. Nelson, 65 N.M. 403, 338 P.2d 301 (1959); *New York,* N.Y. CRIM. PRO. § 20.20 (2A) (McKinney 1971); *Ohio,* State v. Dean, 90 Ohio App. 398, 106 N.E.2d 303 (1951); *Tennessee,* Ford v. State, 184 Tenn. 443, 201 S.W.2d 539 (1945).

[13]Of the ten jurisdictions which have adopted the presumption that death occurs where the body is found, four—Tennessee, California, New Mexico, and New York—adhere to the view that venue of the crime need be proved only by a preponderence of the evidence. These jurisdictions also adhere to the idea that venue is a jurisdictional fact rather than an element of the offense. On the other hand, the view held by two of the jurisdictions—Nebraska and Ohio—is that venue of the crime must be proved beyond a reasonable doubt. The remaining four jurisdictions which have adopted the presumption—Massachusetts, Maryland, New Hampshire, and New Jersey—have not spoken on the degree of proof needed to prove venue. It is interesting to note that the two jurisdictions where the presumption is the most firmly established—Massachusetts and Maryland—have not spoken on the necessary amount of proof.

[14]The validity of the presumption is generally accepted throughout the country. *See, e.g.,* C. MCCORMICK, THE HANDBOOK OF THE LAW OF EVIDENCE 642 (1954); 9 J.

that there is competent and relevant evidence supporting venue to allow the question to go to the jury. Therefore, in the instant case, the trial court should have allowed the jury to determine the factual question of where the death occurred. The court also concluded that the rebuttable presumption that death occurs where the body is found established a prima facie case for the prosecution, and since no evidence was produced to the contrary, the trial court may assume jurisdiction of the case.

The problems of proof which are present in a jurisdictional boundary case are often quite complicated, and the possibility that a criminal may escape punishment should not be overlooked. The criminal's right to have the prosecution brought in the place where the crime was committed and to be governed by that state's law is a well-settled principle,[15] however, in order to assure justice, the public's needs must also be considered. The possibility that a criminal may escape punishment merely because the place of the offense is in doubt[16] is in direct conflict with the public need for strict law enforcement and the punishment of criminal offenders. Section 2419 of the Mississippi Code solves the problem within this state by eliminating the requirement that venue be proved beyond a reasonable doubt where there is a conflict of evidence as to the county in which the offense was committed.[17] Yet the court held that this statute is non-applicable between states.[18] The logic on which the statute is based, however, remains. Perhaps this logic, which eliminated the strict degree of proof of venue within the state, should be applied between the states.[19] In the instant case the court dealt with

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WIGMORE, WIGMORE ON EVIDENCE 462 (3d ed. 1940), Allen v. Mazurowski, 317 Mass. 218, 57 N.E.2d 544, 545 (1944).

[15]*See* note 15 *supra*. The defendant's rights would not be jeopardized by his being tried in either jurisdiction. The basis for the principle that a person be tried in the place where the crime was committed would not apply to the defendant in this case, for he would be considered a foreigner in both Tennessee and Mississippi. The only possible way his rights could be affected would be if the laws of the two states were wholly dissimilar.

[16]In the instant case there is a possibility that Tennessee could not assume jurisdiction, since Tennessee law presumes the homicide to occur where the body is found. Because of this presumption, the Attorney General of Shelby County, Tennessee, initially refused jurisdiction over the case. The better view favors the probability that Tennessee could have assumed jurisdiction. TENN. CODE ANN. § 40-103 (1955), provides that when an offense is commenced within Tennessee and consummated outside the state, the offender is subject, to the jurisdiction of Tennessee, and venue lies in the county where the offense was commenced. In spite of the Tennessee presumption that the homicide occurs where the body is found, evidence to the contrary can rebut this presumption. Moreover, since Tennessee requires that venue be proved merely by a preponderence of the evidence, the defendant's confession that he shot the deceased in Tennessee, should be sufficient to rebut the presumption and allow Tennessee to assume jurisdiction.

[17]Presley v. State, 217 Miss. 112, 63 So. 2d 551, 555 (1950).

[18]*Id.*

[19]Perhaps the reason this court held that MISS. CODE ANN. § 2419 (1956), was not applicable between states was because of its reluctance to extend the traditional

the problem in a different manner by alleviating the prosecution's burden of proof. By adopting the presumption that death occurs where the body is found, the court has greatly simplified the burden of producing sufficient evidence to satisfy the venue requirement in a criminal prosecution. It now appears that this presumption will be sufficient to establish a prima facie case of venue. Yet since this presumption is rebuttable, any contrary evidence will allow the question of venue to be determined by the jury. A disturbing question arises as to whether this presumption is sufficient, or should be sufficient, to prove venue beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis. The very nature of a presumption seems to defy this conclusion.[20] Yet the adopted presumption is logical and should help solve the problems in boundary-line jurisdictional questions which may arise in the future. Since Mississippi still retains the strict requirement for proving venue in state boundary cases, the presumption will be a workable solution to help preclude the possibility of a grave injustice to our society.

George Fair

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boundaries of state jurisdiction. The state boundaries have always been considered the limit of a state's jurisdiction; however, in some instances these limits have been extended to eliminate possible boundary-line jurisdictional problems. The defendant's rights, as discussed in note 15, *supra,* would not be affected to any extent if the jurisdictional limitations were extended in the instant case. Yet the public's interest may definitely be affected if a solution to the instant jurisdictional problem is not found. The public's interest in such a situation is paramount and should be met. In MISS. CODE ANN. § 2430 (1956), the legislature provided that Mississippi could assume jurisdiction in a homicide case if the offense was commenced or consummated in this state. It is certainly reasonable that this statute could be extended to allow concurrent jurisdiction between states in cases where the venue is doubtful. Perhaps this was the legislature's intent.

[20]The fact that a presumption is nothing more than a probable or natural explanation from which the courts have concluded a resulting rule of law tends to discredit the absolute certainty of a presumption. *See* Comment, *Presumptions; Their Use and Abuse,* 17 MISS. L.J. 1 (1945). The fact that Mississippi requires venue to be proven beyond a reasonable doubt and to the exclusion of every other hypothesis appears to require some degree of certainty in proving venue. The question therefore presents itself as to whether a presumption alone or in conjunction with other evidence assures the degree of certainty needed to meet the required standard. There could certainly be other reasonable hypotheses in the present case in conflict with the presumption that death occurred where the body is found. It is reasonable that the body could have been deposited at a place different than that of the death in order to escape detection by the authorities. This hypothesis alone may be sufficient to cause the presumption to fail to meet Mississippi's strict standard of proof.

Limitation of Action in Mississippi — Right as Well as Remedy Terminated for Recovery of Principal and Collateral Security

Appellant's husband assigned a life insurance policy to the appellee as security for a debt. At the time of the husband's death, the statute of limitations on the debt had run. Proceeds of the policy were paid into the registry of the court; appellant and appellee were interpleaded. Appellant raised the statute of limitations as a bar, but the court found that the statute of limitations did not bar appellee's recovery because the assignment had the effect of a pledge,[1] and appellee was entitled to recover the proceeds. On appeal the Mississippi Supreme Court, *held,* reversed and rendered. Section 743[2] of the code provides that completion of the period of limitation on a legal obligation shall terminate the right as well as the remedy; therefore a debtor-creditor relationship is extinguished by the running of the statute of limitations. *Hawkins v. Southern Pipe and Supply Co.,* 259 So. 2d 696 (Miss. 1972).

The development of limitations of actions has been slow and deliberate, beginning in Roman law at an early date.[3] England's first statutes were enacted in 1236, but "[t]he Limitations Act of 1623 marks the beginning of the modern law of limitations on personal actions in the common law."[4] The purpose of the early common law statutes was to discourage the litigation of stale claims, the rationale being that after passage of a substantial period of time the relevant facts would be forgotten, essential evidence would be lost, or witnesses would be dead or unavailable.[5] General statutes of limitation are interpreted as being remedial only and do not affect[6] substantial rights of parties. The general rule, accepted by all but two jurisdictions[7] that have spoken on

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[1]A pledge is defined as:

> [A] security interest in a chattel or in an intangible represented by an indispensable instrument, the interest being created by a bailment for the purpose of securing the payment of a debt or the performance of some other duty. Restatement of Security § 1 (1941).

[2]Miss. Code Ann. § 743 (1956).

[3]*See Developments In The Law—Statutes of Limitation,* 63 Harv. L. Rev. 1177 (1950).

[4]*Id.* at 1178.

[5]6A A. Corbin, Corbin On Contracts § 1377 (1962).

[6]*See, e.g.,* Equity Corporation v. Groves, 53 A.2d 505 (Del. Ch. 1947); Guthrie v. Wilson, 240 Ind. 188, 162 N.E.2d 79 (1959); Oberg v. McComb, 127 Ind. App. 278, 141 N.E.2d 135 (1957); Greene v. Greene, 145 Miss. 87, 110 So. 218 (1926).

[7]*Alabama*—Ellis v. Black Diamond Coal Mining Co., 265 Ala. 264, 90 So. 2d 770 (1956); *California*—Mitchell v. Sanitation Dist. No. One, 150 Cal. App. 2d 366, 309 P.2d 930 (1957); *Colorado—In re* Randall's Estate, 166 Colo. 1, 441 P.2d 153 (1968); *Connecticutt*—M-A-C Loan Plan Inc. v. Schabel, 6 Conn. Cir. 78, 265 A.2d 620 (1969); *Delaware*—Equity Corp. v. Groves, 53 A.2d 505 (Del. Ch. 1947); *Florida*—Walter Denson & Son v. Nelson, 88 So. 2d 120 (Fla. 1956); *Georgia*—Hawes v. Shuman, 125

the issue, is that pure statutes of limitations extinguish neither the right nor the jurisdiction of the court over the subject matter.[8] Wisconsin and Mississippi both hold that when the statute of limitations runs on a legal obligation, the right as well as the remedy is extinguished. The Wisconsin rule is based on a long line of decisions,[9] while in Mississippi the rule is statutory:

> The completion of the period of limitation herein prescribed to bar any action, shall defeat and extinguish the right as well as the remedy; but the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon.[10]

The Mississippi Supreme Court has been consistent in strictly construing this statute.[11] The barred debt, however, was not at issue in the instant case. In dispute was the collateral security.

Ga. App. 117, 186 S.E.2d 582 (1971); *Idaho*—Joseph v. Darrar, 93 Idaho 762, 472 P.2d 328 (1970); *Illinois*—Lavine v. Unruh, 99 Ill. App. 2d 94, 240 N.E.2d 521 (1968); *Indiana*—Guthrie v. Wilson, 240 Ind. 188, 162 N.E.2d 79 (1959); *Kansas*—Murray v. Modoc State Bank, 181 Kan. 642, 313 P.2d 304 (1957); *Kentucky*—Seat v. Eastern Greyhound Lines, Inc., 389 S.W.2d 908 (Ky. 1965); *Maryland*—Fowler v. A. & A. Co., 262 A.2d 344 (D.C. Ct. App. 1970); *Michigan*—Devries v. Alger, 329 Mich. 68, 44 N.W.2d 872 (1950); *Missouri*—Curlee v. Donaldson, 233 S.W.2d 746 (Mo. App. 1950); *Montana*—Stranahan v. City of Harve, 112 Mont. 591, 119 P.2d 629 (1942); *North Carolina*—Williams v. Thompson, 227 N.C. 166, 41 S.E.2d 359 (1947); *New Hampshire*—Smith v. Turner, 91 N.H. 198, 17 A.2d 87 (1941); *New Jersey*—Miller v. Board of Chosen Freeholders, 10 N.J. 398, 91 A.2d 729 (1952); *New Mexico*—Davis v. Savage, 50 N.M. 30, 168 P.2d 851 (1946); *New York*—Allstate Ins. Co. v. Consolidated Mut. Ins. Co., 35 App. Div. 2d 535, 313 N.Y.S.2d 181 (1970); *Ohio*—Collins v. Nuree, 20 Ohio App. 2d 53, 251 N.E.2d 621 (1969); *Oklahoma*—Smith v. Citizens Nat'l Bank, 313 P.2d 505 (Okla. 1957); *South Carolina*—Webb v. Greenwood County, 229 S.C. 267, 92 S.E.2d 688 (1956); *South Dakota*—Davison v. Sasse, 72 S.D. 199, 31 N.W.2d 758 (1948); *Tennessee*—Hackworth v. Ralston Purina Co., 214 Tenn. 506, 381 S.W.2d 292 (1964); *Texas*—Cockrell v. Craugh, 338 S.W.2d 516 (Tex. Civ. App. 1960); *Virginia*—Page v. Shenandoah Life Ins. Co., 185 Va. 919, 40 S.E.2d 922 (1947).

[8]Collins v. Nurre, 20 Ohio App. 2d 53, 251 N.E.2d 621 (1969).

[9]Haase v. Sawicki, 20 Wis. 2d 308, 121 N.W.2d 877 (1963); Reistad v. Manz, 11 Wis. 2d 155, 105 N.W.2d 324 (1960); First Nat'l Bank of Madison v. Kolbeck, 247 Wis. 462, 19 N.W.2d 908 (1945); Long v. Mates, 219 Wis. 414, 263 N.W. 371 (1935); Eingartner v. Illinois Steel Co., 103 Wis. 373, 79 N.W. 433 (1899); Pierce v. Seymour, 52 Wis. 272, 9 N.W. 71 (1881).

[10]MISS. CODE ANN. § 743 (1956). This statute was enacted as § 2685 of the Code of 1880. It has been brought forward unchanged in every succeeding Code: Code of 1892, § 2755; Code of 1906, § 3115; Hemmingway's Code of 1917, § 2479; Code of 1930, § 2313.

[11]Greene v. Greene, 145 Miss. 87, 110 So. 218 (1926); Rogers v. Rosenstock, 117 Miss. 144, 77 So. 958 (1918); Wade v. Barlow, 99 Miss. 33, 54 So. 662 (1911); Trowbridge v. Schmidt, 82 Miss. 475, 34 So. 84 (1903); Proctor v. Hart, 72 Miss. 288, 16 So. 595 (1895).

As a security interest, a pledge[12] should not terminate by the running of the statute of limitations on the principal, even when the statute is interpreted as extinguishing the debt, unless the statute specifically provides that the security interest is extinguished with the debt.[13] Mississippi has a statute directed at mortgages stating that an action can be brought on a lien, mortgage, or deed of trust within the time that is allowed for commencement of an action on the principal.[14] The case law indicates that this statute is also strictly construed.[15]

The court in the instant case found that the stated purpose of the assignment was to secure such indebtedness as might have existed at the time of the settlement of the policy. The court also found that the statute of limitations had run on the principal debt, and in Mississippi when the statute runs, the debt is completely extinguished.[16] Therefore, the court held that there was no indebtedness existing at the time of the settlement of the policy; thus, the assignment expired under its own terms.

The Supreme Court of New Jersey has stated that a statute which operates on the remedy and does not extinguish the right reduces the right to a mere moral obligation, and that "a right without a remedy is a mere shadow."[17] This is not altogether true, because even though the creditor is prohibited from seeking a judicial remedy, there are nonjudicial collateral remedies which may be employed by the creditor except where specifically barred by statute.[18] The fact that pledged property securing a barred debt is not affected by the statute of limitations has already been mentioned.[19] A mortgagee may be able to foreclose a mortgage in a court of equity "since the limitation is considered to bar only the debt."[20] In addition, the mortgagee can hold a nonjudicial sale where the mortgage instrument authorizes one, or he may frustrate the mortgagor by not allowing him to clear title to the property until the debt is paid.[21] The creditor may proceed against the child of the debtor in the division of the estate.[22] Finally, the creditor can use the "self-help" doctrine by using reasonable force to repossess chattels.[23] Although the "self-help" doctrine must be used while in "fresh pursuit," an interesting issue would be raised if the creditor did take possession

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[12]*See* definition, *supra* note 1.

[13]RESTATEMENT OF SECURITY § 47, comment *a* at 136, 137 (1941).

[14]MISS. CODE ANN. § 719 (1956).

[15]State v. Magnolia Bank, 212 Miss. 47, 53 So. 2d 79 (1951); Perkins v. White, 208 Miss. 157, 43 So. 2d 897 (1950); Gates v. Chandler, 174 Miss. 815, 165 So. 442 (1936); Musser v. First Nat'l Bank of Corinth, 165 Miss. 873, 147 So. 783 (1933); McDaniel v. Short, 127 Miss. 520, 90 So. 186 (1921).

[16]MISS. CODE ANN. § 743 (1956).

[17]State v. Standard Oil Co., 5 N.J. 281, 74 A.2d 565, 571 (1950).

[18]*See Developments In The Law—Statutes of Limitation, supra* note 3, at 1248.

[19]*See* RESTATEMENT OF SECURITY, *supra* note 12.

[20]*See Developments In The Law—Statutes Of Limitation, supra* note 2, at 1247.

[21]*Id.* at 1248.

[22]Greene v. Greene, 145 Miss. 87, 110 So. 218 (1926).

[23]*See Developments In The Law—Statutes Of Limitation, supra* note 2, at 1249.

of the property, because statutes of limitation cannot be used by the debtor as the basis for affirmative relief.[24] Even though these non-judicial collateral remedies are cumbersome, it is clear that the right is not emasculated when the remedy is extinguished.

The status of a security interest or pledge other than a lien, mortgage, or deed of trust, remains unsettled in Mississippi. Section 719 of the Mississippi Code and the court in *Perkins v. White* make it clear that liens, mortgages, and deeds of trust do not survive the debts secured by them.[25] The court in the instant case did not construe § 719 to extend to pledges and other security interests. It merely applied § 743 to the language of the assignment itself and held that by its own terms the assignment was barred.[26] The court makes no clear pronouncement, but its use of *Perkins* in the instant case indicates a willingness to construe § 719 to include security interests that are not so limited by the language of their creation.

Luther S. Ott

PUBLIC OFFICIALS — FEDERAL FELONY CONVICTION DOES NOT DISQUALIFY STATE LEGISLATOR FROM HOLDING OFFICE

Plaintiff[1] filed a petition for a writ of quo warranto[2] to question defendant's authority to hold the position of Mississippi state senator. Plantiff contended that under the terms of the Mississippi Constitution of 1890[3] defendant was precluded from holding office, having been convicted of a felony[4] in the United States District Court for the Southern District of Mississippi. Defendant filed a general demurrer[5] to the petition which was sustained and the petition was dismissed. On appeal to the Mississippi Supreme Court, *held,* affirmed. The constitutional

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[24]*Id.*

[25]MISS. CODE ANN. § 719 (1956); Perkins v. White, 208 Miss. 157, 43 So. 2d 897 (1950).

[26]Hawkins v. Southern Pipe and Supply Co., 259 So. 2d 696 (Miss. 1972).

[1]Plaintiff was the incumbent senator from the district in which defendant was elected.

[2]The writ shall be brought in the name of the state "[W]henever any person unlawfully holds or exercises the functions of any public office . . . ." MISS. CODE ANN. § 1120 (1956).

[3]MISS. CONST. art. 4, § 44, provides: "No person shall be eligible to a seat in either house of the legislature, or to any office of profit or trust, who shall have been convicted of bribery, perjury, or other infamous crime . . . ."

[4]Defendant had pleaded guilty to a five count indictment charging him with possession and operation of an unregistered still and concealment of tax due and unpaid on whiskey in unstamped containers. MISS. CODE ANN. § 2632 (1956) also classifies possession of a still as a felony.

[5]A general demurrer to a petition for a writ of quo warranto admits all the allegations well pleaded therein. State *ex rel.* Collins v. Senatobia Blank Book & Stationary Co., 115 Miss. 254, 76 So. 258 (1917).

provision barring those convicted of "infamous crimes"[6] from serving in the state legislature has reference only to such convictions in the state courts of Mississippi. *State ex rel. Muirhead v. State Bd. of Elec. Comm'rs.* 259 So. 2d 698 (Miss. 1972).

That no state will punish one for violations of the criminal law of a foreign jurisdiction is a universally recognized rule of law.[7] However, disqualifications that accompany conviction of certain crimes are not considered a form of punishment, but merely a resultant loss of privilege.[8] Provisions similar to the one around which the instant litigation revolves are found in many state constitutions.[9] The court's interpretation of such prohibitions are divided over whether a felony conviction in federal court results in the loss of state granted privileges. One view is that such a conviction works no disqualification.[10] Such decisions follow the general rule that disqualification statutes are to be strictly construed.[11] These cases share the theme that the right of the individual state to expound its own laws and to restrict the privileges of its citizens should not be based on convictions rendered by foreign courts.[12] In support of this view it is argued that a matter as serious as loss of state-granted privilege should only result from a state court proceeding.[13] This view has been similarly applied in cases involving capacity to be executor of a will;[14] to testify in court;[15] to sit on a jury;[16] and to practice law.[17] There are, however, an impressive number of cases holding otherwise.[18] Several of these cases have pointed out that a reasonable

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[6]MISS CODE ANN. § 680 (1956) defines infamous crime as any offense punishable by death or imprisonment in the penitentiary.

[7]RESTATEMENT OF CONFLICTS § 427 (1934).

[8]83 U. PA. L. REV. 386 (1935).

[9]*See, e.g.,* ALA. CONST. art. 4, § 60; ARK. CONST. art. 5, § 9; GA. CONST. art. II, § 2; IOWA CONST. art. 2, § 5; MONT. CONST. art. IX, § 2; N.C. CONST. art. 6, § 8; OKLA. CONST. art. 3, § 1; TEX. CONST. art. 16, § 2; W. VA. CONST. art. 6, § 14.

[10]*See, e.g.,* People v. Enlow, 135 Colo. 249, 310 P.2d 539 (1957); Crothers v. Jones, 239 La. 800, 120 So. 2d 248 (1960); State *ex rel.* Mitchell v. McDonald, 164 Miss. 405, 145 So. 508 (1933); Isaacs v. Board of Ballot Comm'rs, 122 W. Va. 703, 12 S.E.2d 510 (1940); *cf.* Hildreth v. Heath, 1 Ill. App. 82 (1878).

[11]48 HARV. L. REV. 687 (1935).

[12]*See* cases cited note 10 *supra.*

[13]Isaacs v. Board of Ballot Comm's, 122 W. Va. 703, 12 S.E.2d 510 (1940).

[14]Garitee v. Bond, 102 Md. 379, 62 A. 631 (1905).

[15]Campbell v. State, 23 Ala. 44 (1853); Commonwealth v. Green, 17 Mass. 514 (1822).

[16]Queenman v. Oklahoma, 111 Okla. 261, 71 P. 218 (1901).

[17]*In re* Ebbs, 150 N.C. 44, 63 S.E. 190 (1908).

[18]*See, e.g.,* State *ex rel.* Moore v. Blake, 225 Ala. 124, 142 So. 418 (1932); People *ex rel.* Keenan v. McGuane, 13 Ill.2d 520, 150 N.E.2d 168 (1958); State *ex rel.* Dean v. Haubrich, 248 Iowa 978, 83 N.W.2d 451 (1957); Cowan v. Prowse, 39 Ky. 156, 19 S.W. 407 (1892); State *ex rel.* Barrett v. Sartorious, 351 Mo. 1237, 175 S.W.2d 787 (1943); State *ex rel.* Anderson v. Fousek, 91 Mont. 448, 8 P.2d 791 (1932); State *ex rel.* Olson v. Langer, 65 N.D. 68, 256 N.W. 377 (1934); *cf.* Arnett v. Stumbo, 287 Ky. 433, 153 S.W.2d 889 (1941). *See also* Jones v. Board of Registrars, 56 Miss.

interpretation of this type of provision dictates the inclusion of federal as well as state convictions.[19] The decision in *State ex rel. Olson v. Langer*[20] was based not only on the "logical interpretation" of the statute, but on holdings involving analogous statutes dealing with disbarment of attorneys, which, almost without exception,[21] have held conviction in federal court or in the courts of another state sufficient for removal from the state bar.[22] The Mississippi Supreme Court has twice dealt with the effect of a federal conviction on state-granted privilege. In *Jones v. Board of Registrars,*[23] the court attached no significance to the fact that appellant had been convicted in a federal court rather than a Mississippi court in determining that a pardon would restore appellant's lost franchise privilege. Later in *State ex rel. Mitchell v. McDonald,*[24] the court held that a felony conviction in federal court[25] would not bar appellee from holding office within the state, and in doing so made no mention of *Jones.*[26]

In the instant case, the court observed that the interpretation of words found in the constitution was exclusively within the judicial province, and that statutory definitions, while reflective of legislative intent, were not controlling. Relying on *Daughdrill v. Daughdrill*[27] the court stated that the phrase "in the penitentiary," as used in the statutory definition of "infamous crime,"[28] means only the Mississippi State Penitentiary. The court cited with approval the reasoning in *State ex rel. Mitchell v. McDonald,*[29] *Gutterman v. State,*[30] and *Isaacs*

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766 (1879); State *ex rel.* Beckman v. Bowman, 38 Ohio App. 237, 175 N.E. 891 (1930).

[19]Cowan v. Prowse, 39 Ky. 156, 19 S.W. 407 (1892); *accord,* Irby v. Day, 182 Ark. 595, 32 S.W.2d 157 (1930); *c.f.* Barnes v. District Ct. of App., 178 Cal. 500, 173 P. 1100 (1918).

[20]65 N.D. 68, 256 N.W. 377 (1934).

[21]*In re* Ebbs, 150 N.C. 44, 63 S.E. 190 (1908) (conviction in federal court insufficient for disbarment). The statute was changed in 1927 to include all convictions.

[22]*E.g., In re* Higbe, 99 Cal. Rptr. 865, 493 P.2d 97 (1972); *In re* Kerl, 32 Idaho 237, 188 P. 40 (1920); *In re* Peters, 73 Mont. 284, 235 P. 772 (1925); *In re* Hodgskin, 193 App. Div. 217, 183 N.Y.S. 401 (1920); *In re* Finch, 136 Wash. 609, 287 P. 677 (1930); *In re* Comyns, 132 Wash. 391, 232 P. 269 (1925); *cf.* Seitz v. Ohio Med. Bd., 24 Ohio App. 154, 157 N.E. 304 (1926) (conviction in federal court sufficient for revocation of medical license).

[23]56 Miss. 766 (1879) (decision based on assumption that federal court conviction resulted in loss of state granted franchise privilege).

[24]164 Miss. 405, 145 So. 508 (1933).

[25]Appellee had been convicted of perjury by a federal court in Louisiana.

[26]Jones v. Board of Registrars, 56 Miss. 66 (1879).

[27]180 Miss. 589, 178 So. 106 (1938). The court was interpreting the words as they appeared in a statute dealing with grounds for divorce; *accord,* Crothers v. Jones, 239 La. 800, 120 So. 2d 248 (1960).

[28]MISS. CODE ANN. § 680 (1956). For terms of statute *see* note 6 *supra.*

[29]164 Miss. 405, 145 So. 508 (1933).

[30]141 So. 2d 21 (Fla. 1962).

v. Board of Ballot Commissioners[31] in rejecting appellant's contention that the constitutional prohibition should apply to the conviction in issue.

The court's failure to consider the underlying policy factors behind the constitutional provision creates a potentially anomalous situation. Clearly the policy motivating the enactment of this disqualification provision was to bar from public office those whose past actions reflect an unworthiness of public trust.[32] When dealing with this area of law the courts have, almost without exception,[33] limited themselves to adopting one of two views. The first is the "foreign court" view which relies on decisions interpreting analogous disqualification statutes dealing with the capacity to testify.[34] This view fails to recognize that the policy behind allowing felons convicted in other jurisdictions to testify is to prevent the exclusion of relevant testimony, and to circumvent an unpopular rule,[35] not an unwillingness to extend the effect of the foreign conviction to the disadvantage of the witness.[36] The second is the "logical interpretation" view which relies on cases interpreting analogous statutes dealing with disbarment proceedings.[37] While the argument has been made that public officials should be held to a standard no lower than that required of attorneys,[38] this view fails to recognize that courts have the inherent power to discipline and regulate attorneys as officers of the court.[39] It also fails to consider that many disbarment cases are based not on convictions of infamous crimes but on acts involving "moral turpitude,"[40] a much broader term.[41] By strict application of the "foreign

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[31]122 W. Va. 703, 12 S.E.2d 510 (1940).

[32]49 HARV. L. REV. 157, 158 (1935); 83 U. PA. L. REV. 386, 387 (1935). *See* State *ex rel.* Barrett v. Sartorious, 351 Mo. 1237, 175 S.W.2d 787 (1943); *In re* Peters, 73 Mont. 284, 235 P. 772 (1925); Chase v. Blodgett, 10 N.H. 22 (1838).

[33]*See* Gutterman v. State, 141 So. 2d 21 (Fla. 1962) (appellant not barred from office for conviction of felony in foreign jurisdiction because offense not a felony under Florida law); State v. Biggs, 52 Ore. 433, 97 P. 713 (1908) (appellee not disbarred for federal felony conviction where offense unknown to state law).

[34]Logan v. United States, 144 U.S. 263 (1892); Commonwealth v. Green, 17 Mass. 515 (1822); Weber v. Oklahoma, 18 Okla. 421, 195 P. 510 (1921). *But see* Campbell v. Alabama, 23 Ala. 44 (1853); State v. Chandler, 10 N.C. (3 Hawks) 393 (1824); Chase v. Blodgett, 10 N.H. 22 (1838).

[35]Most states have removed this common law disqualification or restricted it by legislation. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 141, 142 (1954).

[36]*See* 83 U. PA. L. REV. 386, 387 (1935).

[37]*See* cases cited note 22 *supra.*

[38]29 ILL. L. REV. 945, 946 (1935).

[39]*In re* Cohan, 261 Mass. 484, 159 N.E. 495 (1928); *In re* Mussman's Case, 286 A.2d 614 (N.H. 1971); Allgeier v. Johnson, 421 Pa. 342, 219 A.2d 593 (1966).

[40]*E.g.,* State v. Bieber, 121 Kan. 536, 247 P. 875 (1926) (disbarred for misdemeanor of possession of liquor); *In re* Hicks, 163 Okla. 29, 20 P.2d 896 (1933) (disbarred for illicit sexual behavior). *See In re* Dickens, 67 Pa. 169 (1870) (the disbarment need not be based on an indictable offense). *See generally* 7 C.J.S. *Attorney and Client* §§ 19, 20 at 733-734 (1937); 7 AM. JUR. 2d *Attorneys at Law* §§ 24, 25 at 57 (1963).

court" concept the view of the court in the instant case, a public official of the state of Mississippi could be convicted of embezzlement in federal court and remain free to hold public office within the state even though his past conduct clearly indicates an unworthiness of public trust. By contrast, a strict application of the "logical interpretation" view would bar one from public office for conviction of a felony in federal court although the substantive offense of which he was convicted was treated as a misdemeanor, or no crime at all, in the jurisdiction which now bars him from public office. Because of the possibilty of such absurd results achieved by the strict application of the two views above, the courts should ignore altogether the jurisdiction of the court of conviction. The fact that the conviction was rendered by a federal court or the court of another state has no relation to the policy consideration involved. The sole criterion should be whether the offense is considered an infamous crime under the laws of the jurisdiction imposing the disqualification.[42] Under this formula the true policy behind the constitutional prohibition would be given full effect.

Stephen L. Thomas

PUBLIC WELFARE — A STATE MAY PROVIDE LOWER BENEFITS TO AFDC RECIPIENTS THAN TO WELFARE RECIPIENTS IN OTHER FEDERALLY AIDED ASSISTANCE PROGRAMS

Petitioners, recipients of Aid to Families with Dependent Children (AFDC), brought a class action challenging the specific computation procedures used in determining the level of benefits allocated to recipients under the welfare program. Seeking injunctive and declaratory relief against state welfare officials, petitioners charged that the percentage reduction system used by the state violated the Social Security Act[1] and the equal protection clause of the fourteenth amendment.[2] Respondents claimed that the state plan was a rational method of allocating limited funds between the several federally aided "categorical

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[41]29 ILL. L. REV. 945, 946 (1935). *See Calzada v. Sinclair,* 6 Cal. App. 3d 903, 915, 86 Cal. Reptr. 387, 394 (1970) (defines moral turpitude as any conduct "contrary to justice, honesty and good morals"); *cf. In re* Monaghan, 222 A.2d 665 (Vt. 1966).

[42]*Accord,* Gutterman v. State, 141 So. 2d 21, 85 (Fla. 1962); Chase v. Blodgett, 10 N.H. 22, 31 (1838), State v. Biggs 52 Ore. 433, 97 P. 713, 714 (1908) (based on classification of crime in jurisdiction seeking to impose disqualification, not the classification in jurisdiction of conviction). *But see* State *ex rel.* Anderson v. Fousek, 91 Mont. 448, 8 P.2d 791, 793 (1932); State *ex rel.* Beckman v. Bowman, 38 Ohio App. 237, 175 N.E. 891, 892 (1930) (considered the difference in the classification but ruled the classification of the court of conviction to be controlling). *See also* 2 U. CHI. L. REV. 333, 334 (1935); 49 HARV. L. REV. 157, 158 (1935).

[1]Social Security Act § 402(a) (23), 49 Stat. 620 (1935), *as amended,* 42 U.S.C. § 602(a) (23) (1970).

[2]U.S. CONST. amend. XIV.

assistance" programs.[3] A three judge federal court[4] granted relief to petitioners, declaring that the percentage reduction system was a violation of the Social Security Act, but rejected the constitutional claim.[5] Subsequently, the United States Supreme Court upheld the use of the percentage reduction system.[6] Therefore, on respondents' direct appeal to the United States Supreme Court, the judgement was vacated and remanded.[7] On remand, the district court *denied all relief to petitioners.* On appeal to the United States Supreme Court, *held* (5-4), affirmed.[8] States may apply a lower percentage reduction factor to AFDC recipients because a state is not required to provide equal benefits to all recipients of aid under federally aided welfare programs. *Jefferson v. Hackney,* 92 S. Ct. 1724 (1972).

AFDC is one of four federally aided "categorical assistance" programs established under the Social Security Act of 1935.[9] Although the AFDC program is financed by the federal government in cooperation with the states, it is administered by the individual states. All states have elected to participate in the program,[10] and each state has been given significant latitude in administering its program and in determining the level of benefits to be paid.[11] Each state computes its own "standard of need" for an eligible family and then decides how much assistance is to be given in relation to the "standard of need." Some states provide every eligible family with benefits sufficient to meet the full "standard of need,"[12] while others with more limited budgets[13]

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[3]The four categorical assistance programs are: Old Age Assistance (OAA), 42 U.S.C. § 301 *et seq.* (1970); Aid to Families with Dependent Children (AFDC), 42 U.S.C. § 601 *et seq.* (1970); Aid to the Blind (AB), 42 U.S.C. § 1201 *et seq.* (1970); Aid for the Permanently Disabled (APTD), 42 U.S.C. § 1351 *et seq.* (1970).

[4]28 U.S.C. § 2281 (1970).

[5]Jefferson v. Hackney, 304 F. Supp. 1332 (N.D. Tex. 1969).

[6]Rosado v. Wyman, 397 U.S. 397 (1970).

[7]Jefferson v. Hackney, 397 U.S. 821 (1970).

[8]Justice Rehnquist delivered the opinion of the Court, in which Chief Justice Burger, and Justices White, Blackmun, and Powell joined. Dissenting were Justices Douglas, Brennan, Marshall, and Stewart.

[9]Social Security Act § 402(a) (23), 49 Stat. 620 (1935), *as amended,* 42 U.S.C. § 601-09 (1970).

[10]Note, *Redefining Federal Largess Through State Maximum Grant Regulations,* 4 LOYOLA U. L. REV. (L. A.) 182 (1971).

[11]Rosado v. Wyman, 397 U.S. 397, 408 (1970); King v. Smith, 392 U.S. 309, 318 (1968); *see also,* 10 J. FAMILY L. 158 (1970).

[12]As of July, 1971, H.E.W. figures showed that 14 states were paying the full "standard of need" to AFDC recipients. Villa v. Hall, 98 Cal. Rptr. 460, 462 n.6 490 P.2d 1148, 1150 n.6 (1971).

[13]Texas has a constitutional limitation on welfare appropriations. The ceiling is $80,000,000, and the legislature cannot exceed this budget without a constitutional amendment. Jefferson v. Hackney, 40 U.S.L.W. 4585 (U.S. May 30, 1972).

allocate their funds to provide a percentage of determined need.[14] In calculating the benefits to be provided, when AFDC funds are limited, the state applies a percentage reduction factor or establishes a statutory maximum on the level of benefits.[15] Both systems, the "percentage reduction" and the "maximum grant," have been challenged and upheld by the courts.[16] The 1968 amendment to the Social Security Act required the states to adjust their "standard of need" to reflect the rise in living costs.[17] Any state with a mixiumum grant system was required to raise the statutory maximum to accomplish this adjustment.[18] The State of Texas chose to convert from a maximum grant system to a percentage reduction plan.[19] As a consequence, some AFDC recipients found that their benefits were reduced under the new plan. In *King v. Smith*[20]

[14]Example: *Percentage Reduction System:* "Assuming two identical families, each with a standard of need of $200, and outside, nonexempt income of $100, the two systems would produce these results:

Texas System		*Alternative System*	
$ 200	(need)	$ 200	(need)
.75	(% reduction factor)	—100	(outside income)
$ 150	(reduced need)	$ 100	(unmet need)
—100	(outside income)	.75	(% reduction factor)
$ 50	(benefits payable)	$ 75	(benefits payable)

Jefferson v. Hackney, 40 U.S.L.W. 4585, 4586 n.6 (U.S. May 30, 1972). "Nineteen of the 26 states that use a percentage reduction system follow the Texas procedure...." *Id.* at n.4.

[15]*Texas* percentage reduction factors are: OAA—100%; AB—95%; APTD—95%; AFDC—75%. Jefferson v. Hackney, 40 U.S.L.W. 4585 n.3 (U.S. May 30, 1972). Mississippi establishes a statutory maximum grant which decreases for each succeeding child: $30 per month for the first child; $18 per month for the second; $12 per month for each additional child. MISS. CODE ANN. § 7173 (Supp. 1971). In Mississippi, AFDC children are allowed to receive 30% of their determined need while the aged receive 100%. Ward v. Winstead, 314 F. Supp. 1225, 1228 (N.D. Miss. 1970).

[16]*E.g.,* Dandridge v. Williams, 397 U.S. 471 (1970) (upheld Maryland maximum grant regulation); Ward v. Winstead, 314 F. Supp. 1225 (N.D. Miss. 1970) (upheld Mississippi maximum grant system); Lampton v. Bonin, 299 F. Supp. 336 (E.D. La. 1969), *vacated,* 397 U.S. 663 (1970), *rehearing denied,* 398 U.S. 945 (1970) (upheld Louisiana percentage reduction system); *but see,* Villa v. Hall, 98 Cal. Rptr. 460, 490 P.2d 1148 (1971) (California Supreme Court invalidated a California system similar to the Texas plan).

[17]Social Security Act § 402(a) (23), 49 Stat. 620 (1935), *as amended* 42 U.S.C. § 602(a) (23) (1970).

[18]*Id.;* Rosado v. Wyman, 397 U.S. 397, 412 (1970).

[19]In response to the 1968 Social Security amendments, Texas increased its AFDC standard of need 11%; subsequently, Texas abolished dollar maximum grants and reduced payments to 50% of the "standard of need." Jefferson v. Hackney, 304 F. Supp. 1332, 1343 (N.D. Tex. 1969).

[20]392 U.S. 309, 318-19 (1968); *noted in* 22 VAND. L. REV. 219 (1968), *and* 82 HARV. L. REV. 291 (1968).

the United States Supreme Court re-affirmed the right of each state to determine its own level of benefits. In *Dandridge v. Williams*[21] and *Rosado v. Wyman,*[22] the Court recognized and condoned the use of the maximum grant plan. In *Rosado,* the Court expressly rejected the argument that the Social Security amendments deprived the states of their traditional discretion to set the level of benefits.[23] Yet, in spite of the latitude given the states, challenges to the administration of AFDC programs have been sustained by the Court.[24] Where there is a constitutional challenge under the equal protection clause, the Court may invalidate a state regulation where it is without any "reasonable basis,"[25] or where a classification is based on "suspect criteria,"[26] or where the regulation affects "fundamental rights"[27] and there is no "compelling state interest" to justify the regulation. However, in limiting the application of the equal protection clause, the Court has stated that in the area of economics and social welfare a state does not violate the equal protection clause because a classification is imperfect.[28] Some welfare distribution plans may be considered "imperfect," but the legislature may take ". . . one step at a time" as long as its judgements are rational.[29] The question remains as to how far the states are required to go in treating recipients of welfare "equally" under the respective assistance programs.[30]

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[21]397 U.S. 471 (1970) (upheld Maryland's maximum grant regulation); *see also* 23 VAND. L. REV. 1390 (1970), and 84 HARV. L. REV. 60 (1970), and Note, *Redefining Federal Largess Through State Maximum Grant Regulations, supra* note 10.

[22]397 U.S. 397, 413 (1970) (although the Court struck down the New York system because it reduced the "standard of need," a percentage reduction system was endorsed as a means to expose the level of "unmet need.")

[23]397 U.S. 397, 414-15 & n.17 (1970).

[24]*E.g.,* Townsend v. Swank, 404 U.S. 282 (1971) (struck down a regulation prohibiting college students from receiving AFDC benefits); Engleman v. Amos, 404 U.S. 23 (1971) (struck down a New Jersey plan that established income ceilings for AFDC recipients); Shapiro v. Thompson, 394 U.S. 618 (1969) (struck down a one year residence requirement for AFDC eligibility on equal protection grounds); King v. Smith, 392 U.S. 309 (1968) (struck down Alabama "substitute father" regulation).

[25]*E.g.,* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) (the traditional equal protection test).

[26]*E.g.,* Graham v. Richardson, 403 U.S. 365 (1971) (invalidated state statute denying welfare benefits to resident aliens); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948) (classification based on race); Korematsu v. United States, 323 U.S. 214 (1944) (classification based on race).

[27]*E.g.,* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (voting); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (procreation).

[28]Dandridge v. Williams, 397 U.S. 471, 485 (1970); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

[29]Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

[30]The Court has not declared that there is a constitutional right to welfare. *See,* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968); *see also,* 84 HARV. L. REV. 60, 68 & n. 50 (1970).

In the instant case, the Court declined to expand its interpretation of the Social Security amendments. Relying upon its decision in *Rosado,*[31] the Court held that the Social Security Act, as amended, did not compel the states to raise the level of benefits paid to recipients under state welfare programs.[32] Since the programs were originally intended to be administered by the states, the states retained the right to determine the level of benefits to be provided to recipients in the absence of any expressly specific congressional mandate to the contrary. The Court rejected petitioners' claim that the states were required to adopt an "alternative plan" that would provide greater work incentives and increased benefits to AFDC recipients with outside income. Concluding that the Social Security Act by implication did not enact "a generalized federal criterion to which the states must adhere in their computation of standards of need, income, and benefits," the Court found that the state of Texas had compiled with the requirements of the Social Security Act. Considering petitioners' equal protection challenge, the Court acknowledged the fact that many recipients of AFDC assistance were members of minority groups, i.e., Negroes and Mexican-Americans. However, Congress, not the states, established the basic outlines of eligibility for the various categorical grants. The Court found no racial motivation on the part of the state to render "suspect" the classification of AFDC recipients. Moreover, the Court found that there had been no reduction in the total amount of money appropriated to AFDC by the Texas State Legislature. The majority held that it was not irrational for the state to pay higher benefits to the sick and elderly and therefore concluded that ". . . Texas' decision to provide somewhat lower welfare benefits to AFDC recipients [was not] invidious or irrational."[33] Re-emphasizing the position in *Dandridge,*[34] the majority stated that the Court should refrain from passing value judgments on the merits of the various welfare systems;

> So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straightjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them.[35]

Thus, the Court held that, as the states were not required to raise the level of benefits nor provide equal benefits to all recipients of aid under the "categorical assistance" programs, the state of Texas was permitted to apply a lower percentage reduction factor to AFDC recipients.[36]

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[31]397 U.S. 397, 414 (1970).

[32]Jefferson v. Hackney, 40 U.S.L.W. 4585, 4588 (U.S. May 30, 1972).

[33]*Id.* at 4589.

[34]397 U.S. 471, 487 (1970).

[35]Jefferson v. Hackney, 40 U.S.L.W. 4585, 4588 (U.S. May 30, 1972).

[36]Justice Douglas, dissenting, argued that lower payments to AFDC recipients should be viewed ". . . against a background of rank discrimination," as 87% were Negro or Mexican-American. He charged that Texas obscured the standard of need

The significance of the Court's decision can best be viewed from the standpoint of what the Court did not do as compared to what it might have done. The Court's decision suggests a reluctance to impose federal requirements upon the states where traditional policy has permitted state control. Other recent decisions of the Court, including *Dandridge* and *Rosado,* are in accord with this policy of restraint in the area of economics and social welfare.[37] Together, these decisions are indicative of a movement by the Court toward a narrower conception of its judicial role, leaving complex social and economic problems to legislative and administrative bodies. The majority prefers to limit the extension of federal power by "implication" by refusing to find a "preferred method" of allocating benefits "implied" in the Social Security Act.[38] Any law, regulation, or classification must necessarily discriminate against someone or some group. Thus, a major question for the Court is presented: to what extent is the equal protection clause applicable to economic inequities? In Texas, eighty-seven percent of the AFDC recipients were Negro or Mexican-American,[39] yet the majority found no "invidious discrimination" because there was no proven "racial motive" in the classification of AFDC recipients. The discrimination was de facto rather than de jure; and the Court declined to hold this de facto discrimination a violation of the equal protection clause. This move suggests a departure from the open-ended application of the equal protection clause under the Warren Court, where in several cases[40] the Court went beyond the limits of intentional discrimination against racial minorities by extending the substantive aspects of equal protection to the indigent in the context of de facto discrimination.[41]

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by "manipulating a mathematical formula;" and, that the Texas computation method denied some AFDC recipients cash benefits and other non-cash benefits. He argued that Congress did not contemplate a reduction of benefits to AFDC recipients, and that, therefore, Texas violated the congressional intent of the Social Security amendments. *Id.* at 4590-92.

Justice Marshall, dissenting, claimed that the Texas system of allocating benefits violated the Social Security Act by ". . . deterring the needy from working, by depriving the needy of social services, and by excluding some needy from any AFDC aid whatsoever." He argued that social welfare legislation requires "equal treatment for all" under the various categorical assistance programs. *Id.* at 4592-97.

[37]*E.g.,* James v. Valtierra, 402 U.S. 137, 142 (1971) (held there was no denial of equal protection in a defeated referendum for low cost housing); Labine v. Vincent, 401 U.S. 532 (1971) (5-4 decision upholding state law that denied illegitimate children equal inheritance rights with legitimates).

[38]Jefferson v. Hackney, 40 U.S.L.W. 4585, 4587 (U.S. May 30, 1972).

[39]*Id.* at 4589 & n.17.

[40]*E.g.,* Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (state poll tax violated the equal protection clause as discrimination against the poor); Douglas v. California, 372 U.S. 353 (1963) (imposed affirmative duty on the state to provide appellate counsel to indigents); Griffin v. Illinois, 351 U.S. 12 (1956) (struck down de facto barriers to indigents in the criminal process, *i.e.* imposed affirmative duty to provide trial transcripts to indigents).

[41]Sager, *"Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent,"* 21 STAN. L. REV. 767, 779 (1969).

In refraining from weighing the merits of alternative welfare distribution plans, the Court takes a progressive step in recognizing practical realities. The philosophical position of the Court was re-emphasized in a quotation from *Dandridge*:

> We do not decide today that the [state law] is wise, that it best fulfills the relevant social and economic objectives that [the state] might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. . . . [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.[42]

Unless the Court is to assume a legislative posture and impose its judgment on state policy matters it is wise to abstain.[43] This position of the Court is especially appropriate because there are legislatve measures pending before Congress that would significantly change the present welfare system.[44]

William Dean Stark

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[42]Dandridge v. Williams, 397 U.S. 471, 487 (1970).

[43]*But see* 84 HARV. L. REV. 60, 71 (1970) (the writer suggests that although the Court ". . . applauds the War on Poverty, it has conscientious scruples against fighting in it." *Id.* at 71.

[44]*See Welfare, Time for Reform,* SATURDAY REVIEW, May 23, 1970 at 19; H.R. 1, 92d Cong., 1st Sess. (1971); S. 2037, 92d Cong., 1st Sess. (1971); If either the "Negative Income Tax" or President Nixon's "Family Assistance Plan" were adopted, the federal government would guarantee present AFDC recipients a subsistance schedule of payments; the state could elect (or may be compelled) to increase this schedule by adding state funds: *cf. Hearings on H.R. 16311 Before the Senate Committee on Finance,* 91st Cong., 2d Sess., pt. 1 (1970). Secretary Finch stated that: "The Family Assistance Plan would replace the present AFDC program and would provide direct federal payments to all needy families with children." *Id.* at 180.

TORTS—WILLINGNESS TO ABROGATE THE LOCALITY RULE IN MEDICAL MALPRACTICE SUITS INDICATED

The plaintiff sued two Jackson, Mississippi, physicians for injuries she received as a result of an operation they performed on her.[1] A physician from New Orleans, Louisiana, was called as a medical expert by the plaintiff. The lower court, invoking the locality rule, refused to allow the physician to testify on the grounds that "he had no knowledge of the standard of skill and care exercised by physicians in the Jackson area."[2] The plaintiff dismissed the witness without making an offer of proof and closed her case without offering further expert medical testimony. At the close of all the proof the defendants were granted a directed verdict. On appeal to the Mississippi Supreme Court, *held,* affirmed. Unless the nature of the case is such that it is within the common knowledge of laymen, negligence cannot be shown in a medical malpractice case without expert medical testimony that the defendant failed in some way to exercise ordinary care and skill. Although the validity of the locality rule was not decided due to the fact that plaintiff made no offer of proof of the excluded testimony of her medical expert, the court stated that they were "not convinced that the 'locality rule' should be entirely abolished."[3] *Dazet v. Bass,* 254 So. 2d 183 (Miss. 1971).

The locality rule in medical malpractice cases operates to limit the duty of a physician to his patient to that degree of care and skill ordinarily exercised by physicians in good standing, similarly situated in the same locality as the defendant physician.[4] Since the defendant physician is judged by local standards, the plaintiff patient bears the burden of proving a breach of duty by an expert medical witness who is familiar with the standard of care ordinarily exercised in the defendant physician's locality of practice.[5]

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[1]The defendants, both specialists in the field of obstetrics and gynecology, operated on the plaintiff for removal of a growth in her left ovary. Following the operation the plaintiff experienced a gushing of urine from her vagina. After a period of unsuccessful treatment it was discovered that the flow of urine was caused by a small hole in the common wall between the vagina and bladder, and the plaintiff underwent corrective surgery to remove the problem. Dazet v. Bass, 254 So. 2d 183, 184-86 (Miss. 1971).

[2]*Id.* at 187.

[3]*Id.*

[4]*See* 61 AM. JUR. 2d *Physicians and Surgeons* §§ 110, 116, 202, 207 (1972).

[5]This aspect of the locality rule has received widespread attention in recent years due to the so-called "conspiracy of silence" among members of the medical profession. Most writers agree that the locality rule combined with the reluctance or refusal of the medical profession to testify against a fellow member has created a situation in which many justified claims go unredressed simply for the unavailability of expert witnesses. *See, e.g.,* Kelner, *The Silent Doctors — The Conspiracy of Silence,* 5 U. RICH. L. REV. 119 (1970); Markus, *Conspiracy of Silence,* 14 CLEV.-MAR. L. REV. 520 (1965). Some courts, in overruling the locality rule have made mention of the "conspiracy of silence;" *e.g.,* Pederson v. Dumochel, 72 Wash. 2d 73, 431 P.2d 973, 977 (1967).

The locality rule was first announced in 1870 in the Kansas case of *Tefft v. Wilcox*.[6] The court in *Tefft* reasoned that a physician in a rural area should not be held to the same standard of care and skill as a physician in a larger metropolitan area where there is a greater opportunity for a physician to perform and observe surgical procedures and treat more types of diseases.[7] Since the *Tefft* decision virtually every American jurisdiction has applied the locality rule in some form.[8]

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[6] 6 Kan. 46 (1870).

[7] *Id.* at 63-4; *accord,* Small v. Howard, 128 Mass. 131 (1880).

[8] There are basically three variations of the locality rule:

(1) *The strict locality rule* — This rule limits the duty of a physician to that degree of care and skill ordinarily exercised in the community in which he practices. For example, a Jackson, Mississippi, physician would be judged by the standard of care and skill ordinarily exercised within Jackson. *See, e.g.,* Almi v. Updegraff, 8 Ariz. App. 494, 447 P.2d 586 (1969); Govin v. Hunter, 374 P.2d 421 (Wyo. 1962). Under this rule the plaintiff's expert medical witness must be familiar with the standard of care and skill exercised in the defendant's community, i.e., Jackson, Mississippi. *See* Lockart v. MacLean, 77 Nev. 210, 361 P.2d 670 (1961).

(2) *The same or similar locality rule* — This rule limits the duty of a physician to that degree of care and skill ordinarily exercised in his or a similar community; *e.g.,* Walls v. Boyett, 216 Ark. 541, 226 S.W.2d 552 (1950); Meyer v. Moell, 186 Neb. 397, 183 N.W.2d 480 (1971); Richardson v. Doe, 176 Ohio St. 370, 199 N.E.2d 878 (1964); Donaldson v. Maffucci, 397 Pa. 584, 156 A.2d 835 (1959). Most courts define "similar" in socioeconomic terms; *e.g.,* Michael v. Roberts, 91 N.H. 499, 23 A.2d 361 (1941); Morrill v. Kamosinski, 256 Wis. 417, 41 N.W.2d 620 (1950). Other courts disregard socioeconomic factors where medical factors are similar; *e.g.,* Horton v. Vickers, 142 Conn. 105, 111 A.2d 675 (1955); McGulpin v. Bessmer, 241 Iowa 1119, 43 N.W.2d 121 (1950); Sampson v. Veenboer, 252 Mich. 660, 234 N.W. 170 (1931). The plaintiff's medical expert will be held competent to testify as to the standard of care so long as the community in which he practices is deemed the "same or similar" to that in which the defendant physician practices.

(3) *The same neighborhood rule* — This rule limits the duty of a physician to that degree of care and skill ordinarily exercised in the same general neighborhood in which he practices; *e.g.,* Foose v. Haymond, 310 P.2d 722 (Colo. 1957); Levett v. Etkind, 158 Conn. 567, 265 A.2d 70 (1969); Delaughter v. Womack, 250 Miss. 190, 164 So. 2d 762 (1964); O'Neil v. State, 66 Misc. 2d 396, 323 N.Y.S.2d 56 (1971); Pepin v. Averill, 113 Vt. 212, 32 A.2d 665 (1943). This is a liberalization of the strict locality rule. There are no judicial definitions as to what comprises the "general neighborhood" in geographic terms and most courts beg the question in this regard. The plaintiff's medical expert will be held competent to testify so long as he practices in the same "neighborhood" as the defendant physician or is familiar with the standard of care exercised in that "neighborhood". For example, in a malpractice action against a Jackson, Mississippi physician, a medical expert practicing in Brandon, Raymond, Canton, or Clinton, Mississippi, *may* be competent to testify.

It should be noted that a medical expert need not be familiar with the practice in a particular locality if his testimony does not relate to the standard of care. *See, e.g.,* Montgomery v. Starey, 84 So. 2d 34 (Fla. 1955); Meiselman v. Crown Heights Hosp., Inc., 285 N.Y. 389, 34 N.E.2d 367 (1941).

Changes in population distribution, improved medical education and facilities, standardization of medical practice, and increased medical specialization have led some courts to abandon the locality rule, especially as it relates to the competency of a medical expert and the standard of care required of anyone who holds himself out as a medical specialist.[9] Most of these courts have adopted a rule by which the standard of care and skill required of a physician is that of the average practitioner under the same or similar circumstances with his locality of practice as merely a factor to be considered in determining whether or not he exercised proper care and skill under the circumstances.[10]

Other courts, reluctant to entirely abandon the locality rule, have limited its effect by recognizing that certain types of medical procedures have become so standardized that geographic locality should not cause a marked differentiation in the standard of care required of the physician. This rationale has been applied to the treatment of fractures,[11]

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[9]Geraty v. Kaufman, 115 Conn. 536, 162 A. 33 (1932) (due to evidence of standardized practice in treating fractures, non-local medical expert held competent to testify in malpractice action arising out of alleged negligent treatment of a fracture); McGulpin v. Bessmer, 241 Iowa 1119, 43 N.W.2d 121 (1950) (strict locality rule abandoned in favor of a "reasonable physician" rule with locality as merely a circumstance to be considered); Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793 (1968) (strict locality rule abandoned in favor of a "reasonable physician" rule with availability of medical facilities in the locality being a factor to be considered in determining the standard of care required); Naccarato v. Grob, 384 Mich. 248, 180 N.W.2d 788 (1970) (locality rule as applied to medical specialists abandoned in favor of a "reasonable medical specialist" rule without consideration being given to locality); Christy v. Saliterman, 288 Minn. 144, 179 N.W.2d 288 (1970) (locality rule as applied to medical specialists abandoned); Carbone v. Warburton, 11 N.J. 418, 94 A.2d 680 (1953) (locality rule abandoned as applied to the competency of medical experts); Wiggins v. Piver, 276 N.C. 134, 171 S.E.2d 393 (1970) (locality rule abandoned); McElroy v. Frost, 268 P.2d 273 (Okla. 1954) (due to evidence of standardized procedures of x-ray treatment, non-local medical expert held competent to testify in malpractice action arising out of alleged negligent administration of x-ray treatments); Christian v. Jeter, 445 S.W.2d 51 (Tex. Civ. App. 1969) (locality rule as applied to the competency of medical experts abandoned); Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967) (locality rule abandoned in favor of a "reasonable physician" standard with locality as one circumstance to be considered in determining the standard of care required); Hundley v. Martinez, 151 W. Va. 977, 158 S.E.2d 159 (1967) (strict locality rule modified so as to limit its application to those instances in which treatment is not of a standardized nature).

Some courts which have abandoned the locality rule as applied to medical specialists continue to apply it in cases involving general practitioners. *Compare* Naccarato v. Grob, 384 Mich. 248, 180 N.W.2d 788 (1970) *with* Abbe v. Woman's Hosp. Ass'n, 35 Mich. App. 429, 192 N.W.2d 691 (1971).

[10]*E.g.*, McGulpin v. Bessmer, 241 Iowa 1119, 43 N.W.2d 121 (1950); Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793 (1968); Wiggins v. Piver, 276 N.C. 134, 171 S.E.2d 393 (1970); Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967).

[11]Geraty v. Kaufman, 115 Conn. 563, 162 A. 33 (1932).

x-ray treatment,[12] and surgery for removal of a cataract.[13] There are, no doubt, many other medical procedures to which this doctrine could be applied.[14]

In the instant case the court conceded that there was considerable force in the argument that the locality rule is no longer valid, particularly as applied to medical specialists, but nevertheless expressed reluctance at the idea of entirely abolishing the rule.[15] Since it was not necessary to decide the question in the instant case,[16] the court did not express an opinion as to whether the locality rule presently applied in Mississippi or whether it should be modified, and if so, to what extent.[17]

A 1968 study[18] by the Mississippi Medical Association revealed some relevant facts about postgraduate medical education in Mississippi and the percentage of Mississippi specialists who are certified by their respective American boards.[19] Of the non-surgical disciplines the study

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[12]McElroy v. Frost, 268 P.2d 273 (Okla. 1954).

[13]Hundley v. Martinez, 151 W. Va. 977, 158 S.E.2d 159 (1967).

[14]In Morris, *Response to Ribicoff: Malpractice Suits vs. Patient Care*, 37 INS. COUNS. J. 206, 218 (1970), the author lists the following ranking of reasons for bringing malpractice suits:

1. Foreign body left in patient during surgery
2. Untoward results of tight casts
3. Technical surgical errors
4. Lack of informed consent
5. Errors of a resident, intern or nurse
6. Adverse reactions to penicillin or tetanus shots
7. Abandonment of obstetrical patient
8. Burns due to x-ray, diathermy, or chemicals
9. Neglecting to properly attend a surgical cardiac arrest

See also B. FICARRA, SURGICAL AND ALLIED MALPRACTICE (1968) where the author describes case histories of malpractice injuries to various parts of the body.

[15]254 So. 2d at 187.

[16]*See* text *supra*.

[17]The "same neighborhood" rule of Delaughter v. Womack, 250 Miss. 190, 164 So. 2d 762 (1964) is stated as follows:

> [A] physician is bound to bestow such reasonable and ordinary care, skill, and diligence as physicians and surgeons in good standing in the same neighborhood, in the same general line of practice, ordinarily have and exercise in like cases. *Id.* at 196, 164 So. 2d at 766, quoting 41 AM. JUR. *Physicians and Surgeons* § 82 (1942).

[18]MISSISSIPPI MEDICAL ASS'N, PROFILE OF ATTAINMENT — MEASURE OF NEED: A STUDY OF POSTGRADUATE MEDICAL EDUCATION IN MISSISSIPPI (1968) [hereinafter cited as PROFILE].

[19]American board certification may be obtained by specialists in their respective disciplines only after they have met certain minimum *national* standards.

revealed the following breakdown of American board certification:

Specialty	*Percentage certified*
Pediatrics	59%
Dermatology	50%
Pathology	78%
Cardiology	50%
Radiology	67%
Internal Medicine	34%[20]

Of the surgical disciplines the study showed the following breakdown of American board certification:

Specialty	*Percentage certified*
Orthopaedic Surgery	45%
Urology	38%
Obstetrics/Gynecology	36%
Opthalmology	63%
General Surgery	44%
Plastic Surgery	50%
Neurological Surgery	67%[21]

Thus it appears from this 1968 study that of all medical specialties[22] in Mississippi more than fifty percent of the practitioners have been certified by their respective American boards as having met minimum *national* standards.[23]

Despite the encouraging showing from the viewpoint of American board certification, the study revealed that Mississippi ranks behind her neighboring states and states with comparable populations in the availability of institutions within the state having formal medical postgraduate study opportunities.[24] Mississippi has only one such institution whereas Alabama has three, Arkansas two, Louisiana fifteen, and Tennessee four.[25] Although Mississippi ranks behind adjacent and comparable states in that respect, there was no showing in the study that there should be a marked differentiation *within* the state, particularly among specialty practitioners, of the standard of care and skill exercised under the circumstances of each case.

The Mississippi Supreme Court's statement in *Dazet* that the locality rule should not be entirely abolished raises hope among the

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[20]PROFILE, *supra* note 18, at 35.

[21]*Id.* at 36.

[22]At the present time general practitioners are not board certified.

[23]Unless the particular American board requires re-examination for continuation of certification, changes in the state of medical knowledge could cause a slight differentiation in the skill exercised among members of a particular specialty. This fact alone, however, should not give validity to the locality rule since date of certification not geographic locality is the cause of the differentiation.

[24]PROFILE, *supra* note 18, at 98.

[25]*Id.* at 105. The study did not show the number of Mississippi practitioners who attended refresher courses at institutions outside the state.

plaintiff's bar that when given the opportunity the court will liberalize the present narrow rule in favor of a rule broadening the area from within which expert medical witnesses may be obtained. Drawing from the decisions of other jurisdictions a rule could be formulated which would alleviate the problem caused by the "conspiracy of silence" yet take into account any factors peculiar to the locality within which the defendant physician practices.

The 1968 study by the Mississippi Medical Association demonstrates that in attempting to formulate any new rule a difference should be recognized between specialists and general practitioners.[26] This approach was recently recognized by the Supreme Court of Michigan.[27] Since more than fifty percent of Mississippi specialists have met minimum *national* standards it would seem to be a stretch of the imagination to assume that a different standard of care and skill should be applied to them merely because they chose to practice in Mississippi. Medical factors[28] peculiar to the locality in which the defendant practices should be considered as one element in determining the standard of care required and the competency of medical experts.[29] The burden should be on the defendant to come forward with proof of local factors which would warrant a deviation from the national norm.[30] Otherwise, the standard which should govern the specialist is that degree of care and skill exercised by the ordinary specialist, in the same line of practice, under the same or similar circumstances.[31]

The locality rule still has some validity as applied to the general practitioner, particularly to that vanishing species known as the country doctor. Unlike the specialist who imposes a limitation upon the amount of medical knowledge he must digest in order to keep abreast, the general practitioner must attempt to keep current in all areas of medical practice. Likewise there are no minimum national standards for the general practitioner. It is conceivable that a general practitioner in a rural area would be less knowledgeable than his metropolitan brother who discusses medical problems with the specialists who practice in the

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[26]*See* PROFILE, *supra* note 18.

[27]In Naccarato v. Grob, 384 Mich. 248, 180 N.W.2d 788 (1970) the court contrasted the general practitioner and the specialist thusly:

> Whatever the considerations were that allowed the area practice to set the standard for the country general practitioners — they are not relevant to a metropolitan specialist — calling a specialist parochial or bucolic is hardly appropriate.
>
> The reliance of the public upon the skills of a specialist and the wealth and sources of his knowledge are not limited to the geographic area in which he practices. Rather his knowledge is a specialty. He specializes so that he may keep abreast. 180 N.W.2d at 791.

[28]This would include the availability of postgraduate medical education, availability of medical facilities and equipment, etc.

[29]*E.g.*, Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793, 798 (1968).

[30]This shifting of the burden of proof was suggested in Note, *Medical Specialties and the Locality Rule*, 14 STAN. L. REV. 884, 892-93 (1962).

[31]*E.g.*, Christy v. Saliterman, 288 Minn. 144, 179 N.W.2d 288 (1970).

same clinic. On the other hand, the present Mississippi rule[32] is too narrow, even for the country doctor. With the tremendous strides made in formal medical education, and given similarity of medical factors,[33] it is not likely that standards exercised by the general practitioner will vary from locality to locality.[34] Thus, the standard required of a general practitioner should be that standard of care and skill exercised by the average general practitioner in the same or a medically similar locality under the same or similar circumstances.[35] In those cases where it appears that the treatment involved is a standardized procedure which should be unaffected by locality, the application of the same or medically similar locality rule should be suspended.[36]

When the validity of the locality rule is again questioned before the Mississippi Supreme Court, the court should join the increasing number of jurisdictions[37] which have acknowledged "that the legal rule ceases when the reasons for it ceases."[38]

Franklin C. McKenzie, Jr.

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[32]Delaughter v. Womack, 250 Miss. 190, 164 So. 2d 762 (1964).

[33]*See* note 28 *supra*.

[34]*See* D. Louisell & H. Williams, Medical Malpractice ¶ 8.06 at 211 where the authors state:

> Today the question of variation in medical standards according to area seldom arises except in the context of urban as contrasted with rural standards. Even that contrast is of diminishing significance.... *Id.*

[35]*E.g.*, Williams v. Chamberlain, 316 S.W.2d 505 (Mo. 1958); Cavallaro v. Sharp, 84 R.I. 67, 121 A.2d 669 (1956).

[36]*E.g.*, Geraty v. Kaufman, 115 Conn. 563, 162 A. 33 (1932).

[37]Cases cited *supra* note 10.

[38]D. Louisell & H. Williams, *supra* note 34, at 212.

BOOK REVIEWS

Come Drill A Well In My Back Yard

Vincent Scoper, Jr. Copies may be obtained by writing the author at P.O. Box 2366, Laurel, Mississippi 39440. 1971 $2.95. Pages 96.

This book combines the desirable quality of readibility with invaluable basic information about the oil industry. The author, a geologist who has had extensive experience in both onshore and offshore oil and gas exploration, has also worked with landowners, drillers, lawyers, petroleum engineers, and investors. From these relationships he has gained a broad view of the industry which he presents in a plain, easily understood style of language, often enriched with touches of humor. As the author states, this is not intended to be a technical book. It is intended to answer questions which he has received in the course of his dealings with landowners and investors who were curious about the general nature of the oil business and how money is made in oil.

Several groups of people should find this little book useful: landowners who wish to lease their land, have it already under lease, or even have producing wells on it; would-be investors; attorneys who may be familiar with the technicalities of drafting legal papers such as leases and mineral deeds but who also can benefit from some basic knowledge of the geological and producing aspects of this exciting industry. The book should also be a must for law students in an oil and gas course, since it provides a quick background of geological and production information which should aid in understanding the cases and, in general, add color and interest to the course.

Especially helpful are the many excellent drawings and diagrams illustrating graphically how oil was formed, the types of formations in which it is usually found, what a drilling unit looks like, the mechanism of a drilling rig and how drilling mud is utilized, the process of "fishing" to remove a stuck pipe from a well, the procedure when a well "blows out" and a relief well has to be drilled, the final procedures in bringing in a well, the techniques used in secondary recovery or waterflooding a field, how salt domes are formed and why they are important in the oil industry.

The book dispels some popular misconceptions concerning the oil business. For example, the author states that "many people think that oil is found in huge cave-like cavities beneath the surface" and assume that "you just drill a hole and suck it out like a straw in a soda;" or that "oil is found in rivers under the ground." He then describes where oil is actually found and why it is there in the first place. The title of the book itself reflects a popular idea that anyone can drill a well in his back yard, although, as the author points out, in reality an indi-

vidual is bound by conservation regulations in the same manner as an oil company, and a person's back yard would have to contain at least 40 acres.

One chapter describes the techniques employed by oil companies in searching and testing for oil; another answers the question frequently asked by landowners, Why does my neighbor get part of the oil if the well is drilled on my land? The author explains what a "wildcat well" is and describes in detail the methods of drilling a well, including an explanation of "drilling mud" and the reasons for its use. The chapter on offshore drilling includes an interesting drawing of an offshore drilling platform showing seven wells being drilled from the same platform by means of a "whipstock" device.

The latter part of the book deals briefly with selling and buying leases, minerals, and royalty, as well as investing in a drilling venture. Of interest to landowners will be the section explaining what he can expect when he leases his land, particularly the implications of certain lease terms such as pooling, bonus, rental payments and royalty. There is a brief discussion of the types of investments which are available in the oil business, such as the purchase of mineral rights or royalty, and the advantages and disadvantages of buying an oil and gas lease or investing in a working interest.

While this book does not purport to be an in-depth analysis of the many phases of the oil industry, it fulfills it purpose by sketching a broad picture which should excite the interest of many persons to take a closer look, and is well worth the very short time required to read it.

Jean R. Richey

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